In United States Court of Appeals for the District of Columbia Circuit

No. 10044

PEDER KRISTIAN KRISTENSEN, ALSO KNOWN AS PETER KRISTEN KRISTIANSEN, ALSO KNOWN AS PETER CHRISTENSEN, APPELLANT

v.

THE HONORABLE TOM CLARK, ATTORNEY GENERAL OF THE UNITED STATES ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

JOINT APPENDIX

2 *Complaint*

In District Court of the United States for the District of Columbia

No. 4921–'47

PEDER KRISTIAN KRISTENSEN, ALSO KNOWN AS PETER KRISTEN KRISTIANSEN, ALSO KNOWN AS PETER CHRISTENSEN, 1025 NEWPORT AVENUE, DETROIT 15, MICHIGAN, PLAINTIFF,

v.

THE HON. TOM CLARK, ATTORNEY GENERAL OF THE UNITED STATES, DEPARTMENT OF JUSTICE, WASHINGTON, D. C.

THE HON. WATSON B. MILLER, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, UNITED STATES DEPARTMENT OF JUSTICE, WASHINGTON, D. C.,

AND

THE HONS. THOMAS G. FINUCANE, ROBERT M. CHARLES, LEIGH L. NETTLETON, ROBERT E. LUDWIG, AND LAURENCE P. SHERFY, AS MEMBERS OF THE BOARD OF IMMIGRATION APPEALS, 939 "D" STREET, N. W., WASHINGTON, D. C., DEFENDANTS.

Complaint for declaratory judgment and injunction

Filed December 6, 1947

Plaintiff alleges:

1. This Court has jurisdiction of this action. Such jurisdiction is founded upon the Immigration Act of February 5, 1917, as amended, and particularly Section 25 thereof (8 U. S. C. A. 164),

the Act of June 14, 1934, as amended, known as the Declaratory Judgment Act (28 U. S. C. A. 400), and the Act of June 11, 1946, known as the Administrative Proceduce Act, and particularly Secs. 9 (a) and 10 thereof (5 U. S. C. A. 1008 (a), 1009).

2. At all times herein since June 14, 1940, the Hon. Tom Clark, Attorney General, and his predecessors in office (hereinafter
3 referred to as the Attorney General), have had administrative control of the affairs of the Immigration and Naturalization Service, Department of Justice, and of the deportation proceedings against plaintiff set forth in this complaint. During all of said times the Hon. Watson B. Miller, Commissioner of Immigration and Naturalization, and his predecessors in office (hereinafter referred to as the Commissioner), under the general direction of the Attorney General, have had supervision and direction of the affairs of the Immigration and Naturalization Service, Department of Justice, and of said deportation proceedings. At all times herein the Hons. Thomas G. Finucane, Robert M. Charles, Leigh L. Nettleton, Robert E. Ludwig, and Laurence P. Sherfy, as members of the Board of Immigration Appeals, and their predecessors in office (hereinafter collectively referred to as the Board), have been duly authorized to exercise in behalf of the Attorney General all power possessed by him to suspend deportation of plaintiff.

3. Plaintiff is a native and citizen of Denmark. Plaintiff lawfully entered the United States on or about August 17, 1939, for a period of sixty days as a visitor to visit his relatives in the United States and to attend the World's Fair in New York. The outbreak of World War II prevented the return of plaintiff to Denmark and plaintiff, on or about October 2, 1939, and on or about April 3, 1940, applied for and subsequent to each application received from the Commissioner or officials under his direction an extension of stay within the United States, each such extension having been for a period of six months. Plaintiff since his entry into the United States in August 1939, continuously has remained in the United States. By virtue of the facts stated in this paragraph plaintiff necessarily had to earn a living in the United States, and prior to May 1940, he accepted employment therein.

4. In May 1940, deportation proceedings were commenced against plaintiff by the Commissioner or officials under his direction on the grounds that plaintiff had violated his visitor's status in the United States upon seeking employment
4 therein and had thereby remained in the United States longer than permitted by law. A warrant of deportation to Denmark issued May 15, 1941, against plaintiff, but plaintiff was not deported and said deportation proceedings were subsequently stayed for the duration of World War II.

5. On or about October 12, 1944, plaintiff married Grace Marie Tierno, a native-born citizen of the United States, who is now his wife and is wholly dependent upon him for support. Plaintiff is regularly employed in the United States.

6. On or about June 10, 1946, said warrant of deportation was withdrawn and said deportation proceedings were ordered reopened by the Board to allow plaintiff to submit an application for suspension of deportation under Section 19 (c) of the Immigration Act of February 5, 1917, as amended (8 U. S. C. A. 155 (c)), and pursuant to the reopening of said proceedings further hearings were had. On or about June 27, 1947, an order was entered by the Board denying plaintiff's application for suspension of deportation and requiring plaintiff to depart voluntarily from the United States in lieu of deportation. On September 11, 1947, plaintiff duly requested the Attorney General to review said order of the Board. Said request was treated by the Board as a motion addressed to the Board for reconsideration of the merits of plaintiff's case. On November 10, 1947, the Board made an order denying said request and refusing to reconsider the decision of the Board of June 27, 1947. Plaintiff is now under order of the defendants to depart voluntarily from the United States in lieu of deportation.

7. In the course of said deportation proceedings, the Board has found to exist all facts necessary to authorize the suspension of deportation of plaintiff, including the facts that plaintiff has been a person of good moral character for the past five years and that the deportation of plaintiff would cause an economic detriment to his United States citizen wife, except that the Board has not found that plaintiff is eligible to naturalization in the United States. From the findings of fact, conclusions of law, orders and opinions in said proceedings made by the Board, Commissioner, and officials under their direction, it appears that the deportation of plaintiff would be suspended if the Board were of the opinion that plaintiff is eligible to naturalization in the United States. The Board has concluded that plaintiff is not eligible to naturalization in the United States and, solely and exclusively by virtue of this conclusion, plaintiff's request for suspension of deportation has been denied.

8. Said conclusion that plaintiff is not eligible to naturalization in the United States is predicated solely and exclusively on the fact that plaintiff executed and filed with his Selective Service Board, Local Board #57, Detroit, Michigan, Form DSS 301, which form was entitled "Application by Alien for Relief from Military Service", and was the form used by aliens in applying for such relief. The Board held that said execution and filing of said Form DSS 301 rendered plaintiff ineligible to naturaliza-

tion in the United States by virtue of the Selective Training and Service Act of 1940, Section 3 (a) (50 U. S. C. A. App. 303 (a)).

9. Plaintiff on or about October 16, 1940, duly registered under the Selective Training and Service Act of 1940. On or about March 26, 1942, said Board #57, without request by plaintiff, sent him by mail said Form DSS 301. Plaintiff thereupon proceeded to said Board #57 and requested information from a member thereof regarding the effect of filing said Form DSS 301. Plaintiff on said occasion informed the member of said Board #57 that a warrant of deportation was then outstanding against plaintiff. Said member of said Board #57 thereupon informed and advised plaintiff that by virtue of said deportation warrant plaintiff would be deported whether or not he filed said Form DSS 301, that plaintiff was precluded
6 from obtaining United States citizenship, and that the filing of said Form DSS 301 would have no effect on the deportation proceedings against plaintiff. Plaintiff, relying and acting upon said advice and information, on or about March 30, 1942, executed said Form DSS 301 and filed said form with said Board #57. On or about April 30, 1942, said Board #57 informed plaintiff that he had been placed in Classification 1–A and ordered him to report for induction. Plaintiff duly reported for induction and was thereupon advised by the authorities in charge that he was released and should return home because he had filed said Form DSS 301. Plaintiff remained in Classification 1–A from about April 30, 1942, until September 21, 1945, when he was placed in Classification 4–A. Plaintiff at no time objected to his classification of 1–A. On or about November 19, 1946, plaintiff, shortly after having been advised by counsel and knowing for the first time that said deportation proceedings might be affected by the filing of said Form DSS 301, filed an application with said Board #57 to withdraw said Form DSS 301. Plaintiff would not have filed said Form DSS 301 if plaintiff at the time of filing had known the true significance of such filing in relation to plaintiff's eligibility to naturalization and said deportation proceedings.

10. By reason of the facts set forth in this complaint, neither the Selective Training and Service Act of 1940, Section 3 (a), nor any other provision of law renders plaintiff ineligible to naturalization in the United States, and the defendants and the United States are estopped to assert a claim and to act upon the theory that plaintiff is ineligible to naturalization in the United States.

11. Plaintiff has exhausted all administrative remedies available to him to obtain a determination that he is eligible to naturalization in the United States. Plaintiff is not now in custody.

12. Unless the relief herein prayed for is granted plaintiff, he will be compelled to depart from the United States by defendants and if he does not depart voluntarily will be
7 deported by defendants and thereby will be denied opportunity of becoming a citizen of the United States, and will be deprived of his employment and means of livelihood, and may be forced to separate permanently from his wife, to the irreparable and permanent injury of plaintiff.

Wherefore plaintiff prays:

A. For a Declaratory Judgment declaring and adjudging that plaintiff is eligible to naturalization in the United States, and that the defendants should decide plaintiff's application for suspension of deportation on the basis that plaintiff is eligible to naturalization in the United States.

B. For an injunction enjoining and restraining the defendants and all persons acting under them from exercising their power, authority or discretion in respect of suspension of deportation of plaintiff on the theory that plaintiff is not eligible to naturalization in the United States.

December 6, 1947.

DAVID W. LOUISELL,
SAMUEL SPENCER,
Attorneys for Plaintiff,
1712 H Street NW., Washington 6, D. C.

SPENCER & LOUISELL,
1712 H Street NW.,
Washington 6, D. C.,
Of Counsel.

* * * * *

8 In United States District Court

Motion to dismiss

Filed March 1, 1948

Come now the defendants in the above entitled cause and by their attorney, the United States Attorney, move this Court to dismiss the above entitled cause.

GEORGE MORRIS FAY,
United States Attorney,
ROSS O'DONOGHUE,
Assistant United States Attorney.

* * * * *

In United States District Court

[Defendants'] supplemental memorandum of other points and authorities

Filed May 26, 1948

In addition to the reasons already given in the points and authorities in support of a motion to dismiss in this case is the fact that the complaint does not allege a cause of action upon the merits and even if all the facts alleged therein were proved plaintiff would not be entitled to the relief demanded.

Plaintiff alleges, in brief, that he is otherwise eligible for citizenship, except for the fact that he filled out a certain form during the War in order to obtain exemption from the Draft as a national of a neutral country but that when he did so he was advised by a member of his Draft Board that "he would be deported whether or not he filed said Form DSS 301." The form that was filed by plaintiff with his Draft Board on March 30, 1942, is provided for in the Selective Training and Service Act of 1940, Title 50, U. S. C. A. App., Section 303 (a), as follows:

"* * * *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or
9 naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States; * * *"

This language is conclusive and provides for no exceptions. Surely the mere advice by a member of his Draft Board that his deportation would not be affected by signing it does not constitute an excuse of which this Court can take cognizance. The undoubted fact is that plaintiff filed this form stating that he was a national of a neutral country for the sole purpose of obtaining exemption from the Draft and in order to avoid service in the Armed Forces of this Country during a great war when the very life of the country was at stake. Not only was this clearly his purpose in doing so, since this was the sole object of such form, but he also enjoyed the advantages of the relief from service that was extended as a result of said Draft exemption. During the entire War, while others were making great sacrifices, he was required to make none; yet now demands citizenship in this Country that others have preserved. During the entire War he made no effort to withdraw or cancel the form which protected him

from service. Not until November 19, 1946, more than a year after all hostilities had ceased, did he obtain advice of counsel regarding the true effect of his action and then seek to withdraw Form DSS 301.

In a similar case, *In re Martinez*, decided by Judge Gourley of the District Court for the Western District of Pennsylvania, 73 F. Supp. 101, a petition for naturalization was denied. The facts there were much stronger than in the present case for there, in August, 1942, within two weeks after filing Form DSS 301, petitioner sought to withdraw it and filed an application for voluntary induction. He was then ordered to report for service but was found to be physically not qualified. In order to qualify physically he submitted to a major operation at his own expense and was deferred until March 1, 1943. By the time of his recovery men over thirty-eight were no longer being inducted and so he was not accepted for service. The Court very pertinently said in that case, at page 108:

"In the consideration of a case of this nature, I believe the Court must take notice of the physchological [sic] phenomena which existed during the war as compared with the condition which now exists. Many aliens and individuals who now desire citizenship, during the war pleaded their alien status in bar to the performance of military duty and are now found most vehement in their protestations of loyalty, and of their yearning to take up arms in defense of the country of their adoption. Fighting ceased approximately two years ago, and there is now no longer any danger attached to the tardy proffers of military assistance. When soldiers were needed, however, these fair-weather friends were to be found tying the hands of the local draft boards through pleading their alien status. It is known now, their war records as made up by their questionnaires and applications made from time to time, work an injustice due to the fact that the claims made therein are inconsistent with their real mental attitude. Claim is made that in very considerable numbers of instances, more or less incompetent scriveners had been employed by the draft boards and that said employees did not properly instruct, advise or explain to registrants the meaning and provisions of various forms or questionnaires which were signed. The Selective Service Act, however, placed on the registrant the duty of acquainting himself with all requirements under the Selective Service Act. When the registrant signed and swore to a questionnaire or any other forms which he saw fit to request, that document became his writing, and all responsibility for what may be contained therein was assumed by him.

"[10] It does not seem fair or reasonable to me at this late
11 date than an individual should escape the consequences of declarations against interest contained therein, by any resort to impeachment of what may have been set forth in a questionnaire or in a form which might have been executed. This petitioner was forty-four years of age, had lived in this country for approximately 30 years and should have sufficient intelligence and knowledge to know or inform himself of his various responsibilities and obligations under the law. * * *"

In another case, relied on by the plaintiff here, *In Re Johan August Josefsson*, decided by the Attorney General on June 9, 1947, the Attorney General overruled the decision of the Board of Immigration Appeals because, despite the sympathetic appeal of the case, the Attorney General felt he was bound by the strict provisions of the Selective Training and Service Act of 1940. The petitioner there was a citizen of Finland and signed a Form DSS 301. However, when the War was in progress he appeared before the Board of Immigration Appeals and indicated his willingness to serve in the Armed Forces. When Finland became a co-belligerent with the United States on April 5, 1945, while the War was still in progress, his exemption was cancelled by his local Board and he was ordered to report for induction. He would have served except for the fact that he was rejected because of a physical defect.

In another case similar to the present one, *Benzian* v. *Draft Board No. 65 of Manhattan, New York*, Civil No. 40–773 (not reported), Judge Conger decided on January 13, 1948, that plaintiff was not entitled to have his Form DSS 301 cancelled and that he be declared eligible for citizenship. The case was decided on a motion to dismiss.

These are all of the pertinent cases that can be found. In every one the facts were more sympathetic than in the present one; yet in each case the court found that the plaintiff was bound by his actions in signing and filing Form DSS 301 and was not entitled to citizenship.

In this case, where the plaintiff has reaped the benefits of
12 his actions and has given no valid reason that would excuse his action, he would not be entitled to relief on the basis of the facts alleged on his complaint, and, therefore, it is respectfully submitted that it should be dismissed.

GEORGE MORRIS FAY,
United States Attorney,
ROSS O'DONOGHUE,
Assistant United States Attorney.

In United States District Court

Order dismissing cause

Filed July 29, 1948

This case having come on to be heard upon defendant's motion to dismiss, and the Court having considered the arguments presented orally by both parties as well as the memorandum of points and authorities filed herein, it is by the Court this 29th day of July 1948.

ORDERED that the above-entitled cause be and the same is hereby dismissed.

T. ALAN GOLDSBOROUGH, *Justice.*

In United States District Court

13 *Docket entries*

1947		
Dec.	6	Complaint for Declaratory Judgment and Injunction.
Dec.	6	Summons, with Marshal's return thereon.
Dec.	6	Summons, with Marshal's return thereon.
1948		
Feb.	3	Stipulation Extending Time to Answer Complaint.
Mar.	1	Motion to Dismiss by Defendants.
Mar.	1	Memorandum of Points and Authorities in Support of Motion to Dismiss.
Mar.	10	Stipulation Extending Time of Plaintiff to File Opposing Points and Authorities.
Mar.	17	Memorandum of Points and Authorities in Opposition to Motion to Dismiss the Complaint.
May	26	Supplemental Memorandum of Other Points and Authorities.
July	13	Supplementary Memorandum of Points and Authorities in Opposition to Motion to Dismiss the Complaint.
July	29	Order Dismissing Cause.
Sept.	24	Notice of Appeal.
Oct.	21	Stipulation for Substitution of Party Defendant.
Oct.	22	Order for Substitution of Party.

United States Court of Appeals for the District of Columbia Circuit. Filed Sep. 13, 1949. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,044

PEDER KRISTIAN KRISTENSEN, etc., APPELLANT

v.

THE HON. TOM CLARK, et al., APPELLEES

Motion for Substitution of Party

Appellant respectfully moves that the Hon. J. Howard McGrath be substituted as a defendant-appellee in the above cause in the place of the Hon. Tom Clark, and that said action be continued and maintained against said J. Howard McGrath in place of said Tom Clark, and as grounds states:

1. The above entitled action is now pending in this Court, awaiting oral argument.

2. During the pendency of said action in this Court one of the persons named as a defendant-appellee, namely the Hon. Tom Clark resigned as Attorney General of the United States and was succeeded in such office, on or about August 24, 1949, by the Hon. J. Howard McGrath, who is now Attorney General of the United States.

3. The same reasons for having originally named said Tom Clark as a defendant are now applicable to said J. Howard McGrath. There is therefore substantial need for substituting said J. Howard McGrath for said Tom Clark and for continuing and maintaining said action against said J. Howard McGrath in place of said Tom Clark.

Wherefore, appellant respectfully moves that said J. Howard McGrath be substituted as a party defendant-appellee to this action in place of said Tom Clark, and that said action be continued

and maintained against said J. Howard McGrath in place of said Tom Clark.

(Signed) DAVID W. LOUISELL,
David W. Louisell-of Spencer & Louisell,
1712 "H" Street, N. W.,
Washington, D. C.,
Attorneys for Appellant.

Dated: Washington, D. C., September 13, 1949.

Consented to:

GEORGE MORRIS FAY,
United States Attorney,
Attorney for Appellees. CBM

GEORGE MORRIS FAY,
United States Attorney,
Attorney for J. Howard McGrath, Attorney General of the United States. CBM

United States Court of Appeals for the District of Columbia Circuit
April Term, 1949

No. 10,044

PEDER KRISTIAN KRISTENSEN, also known as PETER KRISTEN KRISTIANSEN, also known as PETER CHRISTENSEN, APPELLANT

v.

TOM CLARK, Attorney General of the Unites States, et al., APPELLEES

Order

On consideration of appellant's motion to substitute J. Howard McGrath, present Attorney General of the United States, as appellee herein in the place and stead of appellee Tom Clark, former Attorney General of the United States, on the ground that said J. Howard McGrath succeeded appellee Tom Clark as Attorney General of the United States on August 24, 1949, and on the ground that there is substantial need for continuing and maintaining this action against the successor to appellee Tom Clark, and it appearing that counsel for the other appellees and for J. Howard McGrath, Attorney General of the United States, consent to said substitution, It is

Ordered by the Court that J. Howard McGrath, Attorney General of the United States, be, and he is hereby, substituted as appellee herein in the place and stead of appellee Tom Clark.

Per Curiam.

Dated September 28, 1949.

United States Court of Appeals for the District of Columbia Circuit. Filed Sep. 28, 1949. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit. Filed Dec. 19, 1949. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 10,044

PEDER KRISTIAN KRISTENSEN, also known as PETER KRISTEN KRISTIANSEN, also known as PETER CHRISTENSEN, APPELLANT

v.

J. HOWARD MCGRATH, Attorney General of the United States, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

Argued November 7, 1949. Decided December 19, 1949

Mr. David W. Louisell, with whom *Mr. Samuel Spencer* was on the brief, for appellant. *Mr. Thomas M. Cooley, II* also entered an appearance for appellant.

Mr. Ross O'Donoghue, Assistant United States Attorney, with whom *Messrs. George Morris Fay*, United States Attorney, and *John D. Lane*, Assistant United States Attorney, were on the brief, for appellees.

Messrs. Jack Wasserman and *Irving Jaffe* were on the brief on the behalf of Association of Immigration and Nationality Lawyers, amicus curiae, urging reversal.

Before EDGERTON, MCALLISTER, sitting by designation, and BAZELON, Circuit Judges.

BAZELON, *Circuit Judge:*

Appellant, a citizen of Denmark, entered the United States in August, 1939, under a sixty day temporary visitor's visa to attend the New York World's Fair and to visit his relatives. Caught here by the outbreak of war in Europe, he secured two extensions of

stay—each for six months. Before the expiration of the second six-months' period he obtained employment, allegedly because of economic necessity, only to find that he had thereby violated the terms of his visa. A warrant of deportation issued against him on May 15, 1941, but was stayed because of the impossibility of travel during hostilities. Meanwhile, as an alien subject to a deportation order, he had filed Form DSS 301 ("Application by Alien for Relief from Military Service") on or about March 30, 1942 which resulted in his exemption from military service under the Selective Training and Service Act of 1940, as amended in 1941 (cited hereafter as STSA). He subsequently married an American citizen in 1944 and, in 1946, applied for suspension of deportation under the Immigration Act of 1917, as amended, 54 Stat. 672, 8 U. S. C. § 155(c), which authorizes the Attorney General, in certain circumstances, to suspend deportation of an alien who is not "ineligible to naturalization." The Board of Immigration Appeals denied his application, according to appellant's uncontroverted allegation in his complaint, "solely and exclusively" because appellant's exemption from military service had been secured at the price of a perpetual bar to naturalization. STSA § 3(a), 50 U. S. C. A. App. § 303(a). After exhausting his administrative remedies, appellant sued in the District Court for a declaratory judgment and an injunction against the Attorney General and the Commissioner of Immigration, contending that he was not "residing in the United States" at the time he claimed exemption from service and therefore STSA § 3(a) is inapplicable to him. Appellant was not in custody at the time he brought suit, nor is he today. The District Court sustained defendant's motion to dismiss the complaint.

We think the District Court erred. The initial problem posed is not the availability of review but rather the method by which it may be sought. Is habeas corpus the exclusive remedy to test the legality of a deportation order, as appellee insists, or did the Declaratory Judgment and Administrative Procedure Acts add to the available methods of review?

Before the enactment of these measures, habeas corpus was the sole means of questioning the jurisdiction, fairness and conformity to statute of deportation proceedings.[1] But with the passage of the Declaratory Judgment Act, 48 Stat. 955, 28 U. S. C. §§ 2201, 2202, the courts were given the power to forestall injury by deciding justiciable cases or controversies at the earliest possible moment. Nor did the use of the declaratory judgment in immigration pro-

[1] *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 660, 12 Sup. Ct. 336, 338, 35 L. Ed. 1146, 1149 (1892); *Kabadian* v. *Doak*, 62 App. D. C. 114, 65 F. 2d 202 (1933); *Poliszek* v. *Doak*, 60 App. D. C. 215, 57 F. 2d 430 (1932); *Fafalios* v. *Doak*, 61 App. D. C. 64, 50 F. 2d 640 (1931).

ceedings await the Administrative Procedure Act. In 1938 the Supreme Court sustained this court's decision in *Perkins* v. *Elg*, 69 App. D. C. 175, 180-1, 99 F. 2d 408, 413-4 (1938), mod. and aff'd, 307 U. S. 325, 349-50, 59 Sup. Ct. 884, 896, 83 L. Ed. 1320, 1333-4 (1939), and held the declaratory judgment procedure available to test the legality of the deportation of one claiming to be a citizen of the United States. The interpretation given the new procedure in the *Perkins* case accorded with the purpose of the Act which was, *inter alia*, "To enable public duties and powers to be established without the cumbersome and technical prerequisites of mandamus, certiorari, injunction, prohibition, or habeas corpus." Borchard, *Declaratory Judgments*, 288 (2d ed., 1941).

In view of the decision in *Perkins* v. *Elg*, *supra*, it may well be that even if the Administrative Procedure Act had not been enacted, declaratory judgment procedure would have been available after a deportation order had been entered against an alien. At any rate, the *Elg* case disposes of appellees' assertion that habeas corpus is the exclusive remedy in deportation cases. But § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. A. § 1009 (1948 Supp.) makes it unnecessary to project that line of authority to the present case. That section makes judicial review available at the suit of

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute * * *.

"(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, *any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus)* in any court of competent jurisdiction * * *.

"(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review * * *." (Emphasis supplied throughout.)

The only exceptions to this sweeping grant of review authority exist where "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." 5 U. S. C. A. § 1009 (1948 Supp.). Neither exception is satisfied in this case. The immigration statute does not on its face preclude judicial review but merely states that "the decision of the Attorney General shall be final." 8 U. S. C. § 155(a). Such a statutory declaration of finality, which has not precluded review by way of habeas corpus for a considerable number of years, can hardly qualify now as a bar to review

under this statute. *United States ex rel Trinler* v. *Carusi*, 166 F. 2d 457, 461 (C. A. 3d, 1948). The decision of the Attorney General is "final" in much the same sense as was the decision of local boards in selective service cases. The Supreme Court said of the finality accorded the latter, as might well be said of the statute here involved,[2] that it limited the scope of review to questions of conformity to governing statutes and regulations. "Congress chose not to give administrative action under the [Selective Service] Act the customary scope of judicial review which obtains under other statutes." *Estep* v. *United States*, 327 U. S. 114, 122, 66 Sup. Ct. 423, 428-9, 90 L. Ed. 567, 573 (1946). In addition, the legislators expressly recognized that "it has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified." Sen. Rep. No. 752, 79th Cong., 1st Sess. (1945), reprinted in Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 212 (1946); H. R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), *id.* at p. 275; see statement of Rep. Walter, 92 Cong. Rec. 5654 (1946).

Legislative discussion of the second exception, agency action "committed to agency discretion," similarly reveals no intention to bar the sort of review sought herein. For it was made clear to Congress that "questions of law properly presented" were not withdrawn from review. See House and Senate Committee Reports cited *supra*, reprinted in Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 212, 275 (1946); statement of Rep. Walter, 92 Cong. Rec. 5654 (1946). And since there is no doubt that, if appellant were in custody, habeas corpus would lie to examine into the fairness of the proceedings and their conformity to the governing statutes, it seems obvious that no completely unreviewable discretion has been vested in the Attorney General, within the meaning of the "discretion" exception. *United States ex rel Trinler* v. *Carusi*, 166 F. 2d 457, 461 (C. A. 3d, 1948).

In essence, appellees' contention is that the legislative history of the Administrative Procedure Act evidences an intention to freeze the remedies previously used to test each agency's actions. Under

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[2] The finality of the decision would seem to refer to the administrative process rather than to the Attorney General's interpretation of the statute under which he operates. As Mr. Justice Holmes pointed out in an exclusion case, *Gegiow* v. *Uhl*, 239 U. S. 3, 9, 36 Sup. Ct. 2, 3, 60 L. Ed. 114, 118 (1914), "The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. * * * The conclusiveness of the decisions of immigration officers under § 25 is conclusiveness upon matters of fact." See *Stark* v. *Wickard*, 321 U. S. 288, 310, 64 Sup. Ct. 559, 571, 88 L. Ed. 733, 748 (1944); Freund, *Administrative Powers Over Persons and Property* 240-1 (1928); Van Vleck, *The Administrative Control of Aliens* 153 (1932).

this view, "*any* applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus)" would by an unexplained transference process read "the hitherto applicable procedure" and hence codify the case law holding habeas corpus the exclusive remedy in deportation proceedings.[3] We believe, however, that the language of the statute is clear and that it is satisfied by an interpretation which permits the use of any one of the parenthetically enumerated remedies which fits the circumstances of the case then before the court.

Even if the plain meaning of the statutory language were to be ignored and the legislative history examined for a different content, the search would be fruitless. Only when a "special statutory review" exists under § 10(b) is the use of "any applicable form of legal action" restricted. But examination of the Senate and House reports makes it quite clear that § 10(b)'s reference to "special statutory review" includes only those "common-law forms *referred to and adopted by other statutes* as the appropriate mode of review." House and Senate Committee Reports, cited *supra*, reprinted in Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 212-13, 276 (1946). The immigration statute here relevant makes no reference to habeas corpus and hence, that remedy cannot fit within the category of "special statutory review."

The generally liberal attitude of Congress with regard to the declaratory judgment procedure is revealed in the explanation of § 10(b) offered by the Senate Committee on the Judiciary: "Although the declaratory judgment 'proceeding has not yet been extensively used to bring Federal administrative action before the Federal courts, its potentialities are indicated by its wide use in other fields.' (*Final Report*, Attorney General's Committee, p. 81)." Senate Judiciary Committee Print, June 1945, reprinted in Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 37 (1946). Even where a "special statutory review" existed, it was not contemplated that declaratory judgment procedure would be foreclosed. Thus, the House and Senate reports state, "Declaratory judgment procedure * * * may be operative *before* statutory forms of review are available and may be utilized to determine the validity or application of any agency action." *Id.* at 276, 212-13. Hence, its use where there is no "special statutory review" would follow *a fortiori*.

Our examination of the legislative history brings us to the same conclusion as that reached by the Third Circuit in the *Trinler* case, *supra*. We hold that the Administrative Procedure Act's judicial review section was not intended to perpetuate preexisting rigidities in the use of extraordinary legal remedies but rather to simplify and

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[3] This view is expressed in the Attorney General's *Manual on the Administrative Procedure Act* 97 (1947).

make more flexible the avenues to judicial relief.[4] Thus viewed, appellant's suit for a declaratory judgment is well taken if he can prove the existence of a justiciable case or controversy.

Our decision in *Kaminer* v. *Clark*, — U. S. App. D. C. —, — F. 2d —, July 11, 1949, does not conflict with anything here decided. In that case, Kaminer sought a declaratory judgment in this district although he was already in custody pursuant to a deportation order in the Southern District of New York. We ruled that "An action for declaratory judgment cannot be substituted for habeas corpus so as to give jurisdiction to a district other than that in which the applicant is confined or restrained." In the course of exercising our discretion to deny declaratory relief in that case, nothing was said about its availability in a proper case. Here, declaratory relief is appropriate and since appellant is not in custody in another district, the *Kaminer* rule is necessarily inapplicable.

That this is a case ripe for judicial cognizance is not seriously challenged by the appellees. All that remains for appellant to do is either to depart voluntarily or to go into custody for deportation. To compel him to go into custody before he can have his rights determined would be to defer to formalism and order the performance of a useless act, an act which may require him to sacrifice his possessions in preparation for leaving the country. As Mr. Justice Douglas pointed out in *Estep* v. *United States*, 327 U. S. 114, 125, 66 Sup. Ct. 423, 429, 90 L. Ed. 567, 574 (1946), where the lower court had refused to permit Estep to plead the draft board's lack of jurisdiction over him in defense to a prosecution for failure to report for induction, if habeas corpus were the only remedy available to defendant, it might result in "sending men to jail today when it was apparent that they would have to be released tomorrow." It is true that there are decisions of this court which state that a petitioner in a deportation case would have to enter custody in order to have his rights determined by habeas corpus. See, e. g., *Fafalios* v. *Doak*, 60 App. D. C. 215, 50 F. 2d 640 (1931). But those cases were decided before the enactment of either the Declaratory Judgment Act or the Administrative Procedure Act. In the only post-Declaratory Judgment Act case called to our attention, *Perkins* v. *Elg*, *supra*, this court did

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[4] The Sixth Circuit came to the same general conclusion in *Lincoln Electric Co.* v. *Commissioner of Internal Revenue*, 162 F. 2d 379, 382 (C. A. 6th, 1947). To the same general effect are *United States ex rel Cammarata* v. *Miller*, 79 F. Supp. 643, 646 (S. D. N. Y. 1948); *Scholnick* v. *Clark*, 81 F. Supp. 298, 300 (D. C. D.C. 1948); *Unger* v. *United States*, 79 F. Supp. 281, 286 (E. D. Ill. 1948). Cases stating that the Administrative Procedure Act is merely declaratory of the preexisting law of judicial review are *Valenti* v. *Clark*, 83 F. Supp. 167 (D. C. D. C. 1949) *Olin Industries* v. *NLRB*, 72 F. Supp. 225 (D. Mass. 1947).

not remit petitioner to the habeas corpus remedy but instead granted declaratory relief, which the Supreme Court sustained. Determination of appellant's rights at this juncture detracts not one whit from the administrative process for the Attorney General has already reached his "final" decision and refused to reconsider it.[5] Instead, it satisfies the underlying purpose of the Declaratory Judgment Act which is to decide cases in their incipiency before the law's coercive machinery is brought into play. At the same time, it reinforces the ever-growing concern manifested by the courts for personal liberty and its protection. See *Bridges* v. *Wixon*, 326 U. S. 135, 148, 65 Sup. Ct. 1443, 1449, 89 L. Ed. 2103, 2111-2 (1945).

The only substantive issue before the District Court concerned appellant's contention that the Board of Immigration Appeals ruled incorrectly when it held him "ineligible to naturalization" solely because he filed a claim of exemption from military service under STSA § 3(a). The applicable portion of § 3(a) reads:

> "Except as otherwise provided in this Act * * *, every male citizen of the United States, and *every other male person residing in the United States* * * * shall be liable for training and service in the land or naval forces of the United States: *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States;" 50 U. S. C. A. App. § 303(a).[6]

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[5] Decisions cited by appellees in which this court refused to permit use of the declaratory judgment procedure to interfere with the administrative process are therefore inapplicable. Such cases are *Miles Laboratories* v. *FTC*, 78 U. S. App. D. C. 326, 328, 140 F. 2d 683, 685 (1944); *Utah Fuel Co.* v. *National Bituminous Coal Comm.*, 69 App. D. C. 333, 338, 101 F. 2d 426, 431 (1938); *Hearst Radio Corp.* v. *FCC*, 73 F. Supp. 308, 309 (D. C. D. C. 1947). Other instances where this court exercised its discretion to deny declaratory relief are *DiBenedetto* v. *Morgenthau*, 80 U. S. App. D. C. 34, 35, 148 F. 2d 223, 225 (1945) (court asked to declare law applicable to a proceeding over which the Court of Claims had complete jurisdiction under the Tucker Act); *Clark* v. *Memolo*, U. S. App. D. C., May 9, 1949 (court asked to vacate sentence already handed down by a District Court in another district).

[6] The amicus curiae brief filed herein and appellant in his reply brief state that Denmark was not a neutral, citing Military Government Law No. 3, Office of Military Government for Germany

To support his request for relief, appellant urges that he was not "residing in the United States" within the meaning of § 3(a) at the time he filed the exemption form, was therefore never liable for military service, and hence his claim of exemption does not bar him from naturalization.

It is axiomatic that residence is not a term of fixed legal definition but takes on shades of meaning according to the statutory framework in which it is found. Beale, *Residence and Domicil*, 4 Iowa L. Bull. 3, 4 (1918); *Raymond* v. *Leishman*, 243 Pa. 64, 89 Atl. 791 (1914). And like domicile, with which it is sometimes said to be synonymous, it is a question to be determined in each case by examination of a party's intention, acts, declarations, the nature of his stay, etc. *Petition of Herschman*, 163 F. 2d 865, 867 (C. A. 7th, 1947); 1 Beale, *Conflict of Laws* 109 (1935); 8 Mertens, *Law of Federal Income Taxation* 252 (1942). But wherever used, the term has an irreducible minimum of meaning. As we shall indicate, it requires at least an abode which is in some degree permanent and is the result of choice. And where aliens are concerned, absent unusual circumstances, it also requires the consent of the sovereign. Appellant's continued presence here was in no sense permanent, was not the result of choice, and was under the express dissent of the sovereign.

Appellant's permit to enter this country as a "temporary visitor" was in the nature of a conditional grant from the sovereign,[7] subject to revocation the instant he violated the designated status. *Schacht* v. *Young*, 164 F. 2d 882, 883 (C. A. 5th, 1947). In *Leonhard* v. *Eley*, 151 F. 2d 409, 410 (C. A. 10th, 1945), the court took note of the conditional nature of the permission in a case involving STSA § 3(a) when it said that "Aliens residing in the United States, *so long as they are permitted by the government to remain therein*" (emphasis

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(U. S.), Title 23, enacted November 15, 1944, and conclude therefrom that appellant was not covered by STSA § 3(a). It appears, however, that the Selective Service Board classed Denmark as a neutral within this Act beginning March 16, 1942. Local Board Memorandum No. 112. No conclusive determination of Denmark's status during the period pertinent to this case has been made by the State Department. But since we decide the case on other grounds, consideration of this issue is unnecessary.

[7] *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659, 12 Sup. Ct. 336, 338, 35 L. Ed. 1146, 1149 (1892); *Johannessen* v. *United States*, 225 U. S. 227, 240, 32 Sup. Ct. 613, 616, 56 L. Ed. 1066, 1071 (1912); *Lai To Hong* v. *Ebey*, 25 F. 2d 714, 716 (C. A. 7th, 1928). See *In re Gaffney's Estate*, 252 N. Y. Supp. 649 (Surr. Ct., 1931), for a holding that a "temporary visitor" was not an "inhabitant" under a state law entitling only "inhabitants" to letters of administration. The court held the meaning of "inhabitant" to be "coordinate with that of resident." *Id.* at 652.

supplied) are entitled to the protection of the sovereign and hence are liable for military service. The inference to be drawn, although not made explicit by the court, is that without such permission to remain, there would be no liability to service under this Act. Thus, when appellant violated his visitor's status by accepting employment and a deportation warrant issued against him, any prospect of his stay developing what it lacked, the limited degree of permanence required for residence, was foreclosed to him. See Beale, *Residence and Domicil*, 4 Iowa L. Bull. 3 (1918).

This view accords with the way in which residence is generally treated under the immigration laws. The nature of an alien's stay in this country under those statutes takes its meaning from the terms of the original permission to enter and its continued recognition by the sovereign. Thus, time spent here illegally, as after the expiration or revocation of a temporary visa, is not credited to the five year residence requirement prerequisite to naturalization. *United States* v. *Kreticos*, 59 App. D. C. 305, 307, 40 F. 2d 1020, 1022 (1930); *In re Wieg*, 30 F. 2d 418 (S.D. Texas, 1929); *Ex Parte Domenici*, 8 F. 2d 366, 367 (D.Mass., 1925). The reasoning of Mr. Justice Holmes in *Kaplan* v. *Tod*, 267 U. S. 228, 230, 45 Sup. Ct. 257, 69 L. Ed. 585, 587 (1925), which dealt with a child within a class barred from entry by statute, illustrates that an alien's physical presence alone is not conclusive of residence: "until she legally landed [appellant] 'could not have dwelt within the United States' [within the meaning of the Act] * * *. When her prison bounds were enlarged by committing her to the custody of the Hebrew Society, the nature of her stay within the territory was not changed. She was still, in theory of law, at the boundary line, and had gained no foothold in the United States."

In addition to the fact that the sovereign had withdrawn its consent by issuing a deportation order, there is the additional circumstance that appellant's continued presence in this country between the time of the order and his claim of exemption was the result of the outbreak of war in Europe. Presence in a foreign land because of war, and the attendant inability to return to one's own country, does not possess the volitional element which is basic to residence. Thus, as Judge Learned Hand pointed out, "there is substantial unanimity that, however construed in a statute, residence involves some choice * * * and that presence elsewhere through constraint has no effect upon it." *Neuberger* v. *United States*, 13 F. 2d 541, 542 (C. A. 2d, 1926). Cf. *Millett* v. *Pearson*, 143 Minn. 187, 173 N. W. 411, 412 (1919).

Clearly, at the time he registered and subsequently filed Form DSS 301, appellant had been deprived of the volition necessary to residence because proceedings against him had been completed and he was awaiting the purely ministerial act of deportation. An alien similarly situated was held not to be a "resident" for the purpose of

taxation in *Florica Constantinescu* v. *Commissioner of Internal Revenue*, 11 Tax Ct. 36 (1948). In that case, the petitioner, a Roumanian citizen residing in France, had originally been admitted to the United States in 1939 under a temporary visitor's visa. During the entire taxable year involved, she was the subject of a deportation order whose execution had been stayed because of war conditions. Under such circumstances, the court concluded that although "during all of the time here in question she was physically present in the United States, * * * mere physical presence in a foreign country, even though it is considerably prolonged, is not of itself sufficient to establish residence." *Id.*, at 42-3. The Tax Court's reasoning is persuasive because of the similarity in origin of the obligation to pay taxes and the obligation of military service. Both inhere in the allegiance owed to a protecting sovereign.

Appellant's lack of choice is further illustrated by the fact that even voluntary departure pursuant to the deportation order was unavailable to him because Denmark was under German occupation. Under similar facts, a person who left the United States to travel in Germany and was caught there by the course of war, was held not to be "resident within" Germany within the meaning of the Trading with the Enemy Act. *McGrath* v. *Zander*, — U. S. App. D. C. —, — F. 2d —, Oct. 10, 1949; *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C. A. 2d, 1926).

In all the cases involving liability for military service under § 3(a) of the Selective Training and Service Act which have come to our attention, the aliens held to be "residing in the United States" had lived in this country for long periods of time, were not here under temporary visitor's visas, and no deportation orders were involved.[8] The only case holding that a "temporary visitor" is "residing in the United States" within the terms of § 3(a) is *Benzian* v. *Godwin*, 168 F. 2d 952 (C. A. 2d, 1948), cert. den. 335 U. S. 886, 69 Sup. Ct. 235 (1948), in which no deportation order had been issued. Judge Frank, speaking for the court, held that when Congress amended STSA § 3(a) in 1941 to make liable for service "all male persons

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[8] See, e. g., *Cervantes* v. *United States*, 163 F. 2d 294 (C. A. 9th, 1947); *United States* v. *Lamothe*, 151 F. 2d 340 (C. A. 2d, 1945); *Albany* v. *United States*, 152 F. 2d 266 (C. A. 6th, 1945); *Leonhard v. Eley*, 151 F. 2d 409 (C. A. 10th, 1945); cf. *In re Martinez*, 13 F. Supp. 101 (W. D. Pa. 1947); *Petition of Bartenbach*, 82 F. Supp. 649 (W. D. Pa. 1949) (entered for *permanent* residence in 1940). In *Ex Parte Asit Ranjan Ghosh*, 58 F. Supp. 851, 854 (S. D. Cal. 1944), one who entered in 1940 for the purpose of university study and was ordered inducted in 1944 was held not to be "residing in the United States" and, therefore, not liable for military service.

residing in the United States," [9] it adopted the Attorney General's construction of that phrase as previously used in § 2 in connection with persons subject to *registration*. That construction had been to the effect that for *registration* purposes, persons here under temporary visas were "residing in the United States." 39 Op. Atty. Gen. 504 (Oct. 11, 1940). Without examining into the merits of the residence question, the court in the *Benzian* case deferred to the rule of statutory construction that Congressional reenactment of an administratively interpreted statute evidences Congressional approval of that interpretation, and extended the rule to use of the old phrase in a new context. That rule, however, had its origin in situations where a statutory provision had been interpreted by an agency over a long period of years and Congress then reenacted the same provision.[10] In contrast, as already indicated, we are confronted with a transposition of a phrase from one context in the statute to another, with no direct evidence whatsoever that Congress was aware of the Attorney General's construction of the phrase in the first context.[11] As the Supreme Court said in *Girouard* v. *United States*, 328 U. S. 61, 69-70, 66 Sup. Ct. 826, 830, 90 L. Ed. 1084, 1090 (1946), where it overruled its own construction of a statute which had come to the attention of Congress several times and the construed portion had been reenacted, "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error. The history of the 1940 Act is at most equivocal. It contains no affirmative recognition of the rule of [these] * * * cases. The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of these cases." See concurring opinion of Justice Rutledge in *Cleveland* v. *United States*, 329 U. S. 14, 22-4, 67 Sup. Ct. 13, 17-8, 91 L. Ed. 12, 18-9. Congressional reenactment without express consideration or reference cannot give controlling weight to an originally erroneous administra-

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[9] Originally, the Act made all "male persons residing in the United States" subject to registration but only those who had declared their intention of becoming citizens were liable to service.

[10] *Crane* v. *Commissioner of Internal Revenue*, 331 U. S. 1, 8, 67 Sup. Ct. 1047, 1051-2, 91 L. Ed. 1301, 1307 (1947); see Crawford, *Statutory Construction* 439 (1940).

[11] No reference is made to the Attorney General's opinion in the Conference Report of the House and Senate on the 1941 amendment, H. R. Rep. No. 1554, 77th Cong., 1st Sess. (1941).

tive interpretation.[12] The Attorney General's opinion relied on in the *Benzian* case cites us to no authority in support of its conclusion that a "temporary visitor" is necessarily "residing in the United States."

We are unable to agree that Congressional use of a term having as rich a lay and legal meaning as "residing" was intended to include all "temporary visitors," regardless of the surrounding circumstances, or their own attitude and that of our government toward their presence here. Cf. Mertens, *op. cit. supra* at 249-50. If Congress had meant to make liable to military service "all male persons in the United States," we do not think that it would have inserted the requirement that such persons be "residing."

We hold that, absent any showing of acts or declarations indicating an intention to remain at the time the form was filed, the immigration authorities erroneously construed "residing in the United States" when they held it applicable to an alien in this country under a temporary visitor's visa whose deportation had been ordered and then stayed because of war. Since, under the facts taken to be admitted by the pleadings, appellant was not a resident at the time he filed Form DSS 301, the claim of exemption was without effect and he was not "ineligible to naturalization" solely because of such filing.[13] Of course, our conclusion does not obviate the requirement that appellant otherwise comply with the naturalization statutes.

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[12] *United States* v. *Missouri Pac. R. Co.*, 278 U. S. 269, 280, 49 Sup. Ct. 133, 137, 73 L. Ed. 322, 377 (1927); *Hanson* v. *Landy*, 24 F. Supp. 535, 540 (D. Minn., 1938); *Allen* v. *Long*, 272 Mass. 502, 172 N. E. 643 (1930); Cf. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 134, 56 Sup. Ct. 397, 400, 80 L. Ed. 528, 531 (1936).

[13] The government suggests that appellant, by filing Form DSS 301, was estopped from later challenging its validity as applied to him. But obviously, as Judge Frank pointed out in the *Benzian* case *supra* at 956, "appellant's status as resident or non-resident was unaffected by the filing of that form." Nor does the fact that a procedure for determination of residence (not available to appellant) had been established by regulation in February, 1942 (pursuant to 50 U. S. C. A. App. § 305(a) alter the situation; that procedure was available only to those aliens who invoked it within three months after their entry. Since appellant had entered in August, 1939, and did not claim exemption until about March 30, 1942, which was thirty-one months rather than three months after entry, he could not then get any administrative interpretation. Not until 1945 was any provision made for extension of the three-month limitation. Moreover, the regulations contain nothing to aid in the determination of

The judgment below is reversed and the cause remanded to the District Court for appropriate action in accordance with this opinion.

Reversed.

United States Court of Appeals for the District of Columbia Circuit. Filed Dec. 19, 1949. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit
October Term, 1949

No. 10,044

PETER KRISTIAN KRISTENSEN, also known as PETER KRISTEN KRISTIANSEN, also known as PETER CHRISTENSEN, APPELLANT

vs.

J. HOWARD MCGRATH, Attorney General of the United States, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: EDGERTON, MCALLISTER, sitting by designation, and BAZELON, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for appropriate action in accordance with the opinion of this Court.

Per Circuit Judge BAZELON.

Dated December 19, 1949.

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whether a person in appellant's position was "residing in the United States." They merely specify that persons in certain categories are not to be deemed "residing," leaving the staus of other persons to be fixed by means of an "Application for Determination of Residence" under Regulation 611.13(7) Title 32, Code Fed. Regs. § 611.13 (1943 Supp.). But, as already indicated, such a determination was unavailable to appellant at the time he filed Form DSS 301.

United States Court of Appeals for the District of Columbia Circuit. Filed Mar. 14, 1950. Joseph W. Stewart, Clerk.

In the United States Court of Appeals for the District of Columbia Circuit

No. 10,044

PEDER KRISTIAN KRISTENSEN, etc.

v.

J. HOWARD MCGRATH, Attorney General of the United States, et al.

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for a writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix.
2. Motion to substitute.
3. Order substituting J. Howard McGrath, Attorney General, in the place and stead of Tom C. Clark.
4. Opinion.
5. Judgment.
6. This designation.
7. Clerk's certificate.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Appellee.

March 14, 1950

Certificate of Service

I hereby certify that I have this day served a copy of the Designation of Record on Messrs. Davis W. Louisell and Samuel Spencer by mailing copies to them at their business address, 1712 H Street, N.W., Washington, D. C.

PHILIP B. PERLMAN,
Solicitor General.

Dated at Washington, D. C., this 14th day of March, 1950.

United States Court of Appeals for the District of Columbia Circuit

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered from 1 to 29, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and of the proceedings in the said Court of Appeals, as designated by counsel, in the case of: Peder Kristian Kristensen, also known as Peter Kristen Kristiansen, also known at Peter Christensen, Appellant, v. J. Howard McGrath, et al., Appellees, No. 10,044, January Term, 1950, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this Eighteenth day of March, A. D. 1950.

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia Circuit.

In the Supreme Court of the United States, October Term, 1949

No. —

J. HOWARD MCGRATH, Attorney General of the United States, et al.,
PETITIONER

v.

PEDER KRISTIAN KRISTENSEN, ETC.

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

1. For the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the case on the merits, the printed record shall consist of the following:

(a) Joint Appendix.

(b) The proceedings had before the United States Court of Appeals for the District of Columbia Circuit as set forth in the designation of Record filed by the Petitioner.

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to file with the Clerk of the United States Supreme Court the entire transcript of record

in the United States Court of Appeals for the District of Columbia Circuit, and it is agreed that the parties hereto may refer in their briefs and on oral argument to said transcript of record, including any part which has not been printed.

PHILIP B. PERLMAN,
Solicitor General.
Counsel for Petitioner.
DAVID W. LOUISELL,
Counsel for Respondent.

March 14, 1950.

Supreme Court of the United States, October Term, 1949

No. —

J. HOWARD MCGRATH, Attorney General of the United States, et al.,
PETITIONERS

vs.

PEDER KRISTIAN KRISTENSEN, also known as PETER KRISTEN KRISTIANSEN, also known as PETER CHRISTENSEN

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioners,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 27th, 1950.

(S.) FRED M. VINSON,
Chief Justice of the United States.

Dated this 17th day of March, 1950.

Supreme Court of the United States

Order allowing certiorari

Filed May 15, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 734

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES ET AL., PETITIONERS

v.

PEDER KRISTIAN KRISTENSEN, ALSO KNOWN AS PETER KRISTEN KRISTIANSEN, ALSO KNOWN AS PETER CHRISTENSEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 34

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES ET AL., PETITIONERS

v.

PEDER KRISTIAN KRISTENSEN, ALSO KNOWN AS PETER KRISTEN KRISTIANSEN, ALSO KNOWN AS PETER CHRISTENSEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of petitioners, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit reversing the order of the District Court for the District of Columbia, which dismissed for lack of jurisdiction respondent's complaint for a declaratory judgment and an injunction.

OPINION BELOW

The opinion of the Court of Appeals (R. 17–29) has not yet been reported. The District Court wrote no opinion (see R. 12).

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1949 (R. 29). By order of the Chief Justice, dated March 17, 1950, the time for filing a petition for a writ of certiorari was extended to and including March 27, 1950 (R. 32). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a final deportation order is subject to direct review under Section 10 of the Administrative Procedure Act, in lieu of a proceeding in habeas corpus.

2. Whether a final deportation order may be directly questioned in a declaratory judgment proceeding, in lieu of a proceeding in habeas corpus.

3. If either of such methods of review is available in this case, then there is presented the further question whether the court below erred in finding respondent eligible for the grant of discretionary relief to bar deportation despite his having applied for and obtained, as a neutral alien, relief from military service during World War II.

STATUTES INVOLVED

Section 19 (a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U. S. C. 155 (a), directs that any alien found subject to deportation

"shall, upon the warrant of the Attorney General, be taken into custody and deported * * *. In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final."

Section 19 (c) of the same Act, 8 U. S. C. 155 (c), specifies that in the cases of certain categories of deportable aliens, "the Attorney General may * * * suspend deportation of such alien if not * * * ineligible to naturalization * * *." Under the terms of the statute, such suspension of deportation can result in legalization of the applicant's residence in the United States only if Congress thereafter passes a concurrent resolution favoring such suspension of deportation.

The Declaratory Judgment Act, 28 U. S. C. 2201, directs that:

> In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, provides in pertinent part as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.—
>
> (a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.
>
> (c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. * * *

Section 3 (a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U. S. C. App. 303, provided in part:.

> Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States * * * shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *

STATEMENT

Respondent, an alien who is the subject of deportation proceedings, brought this action, initiated by a "Complaint for Declaratory Judgment and Injunction" (R. 2–7), in the District Court for the District of Columbia, against the Attorney General, the Commissioner of Immigration and Naturalization, and the members of the Board of Immigration Appeals. The suit was brought under the Declaratory Judgment Act and the Administrative Procedure Act (R. 2). The

complaint makes the following allegations (R. 3–6): Respondent, a Danish citizen, entered the United States as a temporary visitor on August 17, 1939. He was admitted for a period of sixty days to visit relatives and attend the New York World's Fair. The outbreak of the war in Europe prevented his departure and he obtained two extensions of stay, each for six months. Deportation proceedings were commenced against him in May, 1940, on the ground that he had violated his visitor's status by obtaining employment in the United States and had thereby remained in the United States longer than permitted by law. On May 15, 1941, he was ordered deported to Denmark, but deportation was deferred until the cessation of hostilities. He has continued to reside in the United States since then, and married an American citizen on October 12, 1944 (R. 3–4).

Respondent registered under the Selective Training and Service Act of 1940. However, he executed and filed an application for relief from military service as a neutral alien (form DSS 301) on or about March 30, 1942. This was done, the complaint alleges, after he had been informed by a member of his local Selective Service board that since he was already subject to deportation, the signing of form DSS 301 would have no effect on his deportation and that he was precluded from obtaining American citizenship (R. 5–6). He asserts that he would not have filed

the form if he had known of its effects on his deportation and eligibility for naturalization (R. 6). His request for exemption was honored, and he never was called upon to perform military service for the United States (R. 6). After learning that the filing of form DSS 301 might affect his deportation, he applied, in November 1946, to withdraw his application for exemption (R. 6).

The unexecuted warrant of deportation which had been outstanding against him since 1941 was withdrawn on or about June 10, 1946. The deportation proceeding was reopened to permit respondent to apply for suspension of deportation on the basis of his marriage to an American citizen. After consideration of the evidence adduced in connection with the application for suspension of deportation, the Board of Immigration Appeals, on June 27, 1947, denied the plea for suspension of deportation on the ground that respondent's application for relief from military service as a neutral alien had, under the requirements of the Selective Training and Service Act, rendered him ineligible for naturalization, and consequently disqualified him for the discretionary benefits under the statute authorizing suspension of deportation. (See *supra*, pp. 3, 5.) However, the Board of Immigration Appeals directed that he be permitted to depart from the United States voluntarily in lieu of deportation, if he so desired

(R. 4). A motion for reconsideration of that order was rejected. The complaint further alleges that the Board of Immigration Appeals has "found to exist all facts necessary to authorize the suspension of deportation of plaintiff," except for the finding that he is ineligible for naturalization, and that "it appears that the deportation of plaintiff would be suspended if the Board were of the opinion that plaintiff is eligible to naturalization in the United States" (R. 4–5). The Board's view of this statutory requirement, as applied to this case, is asserted to be erroneous (R. 5–6).

Respondent has not departed from the United States, nor has he been required to surrender under the order of deportation; he is not in custody (R. 6). He prays for a declaratory judgment that he is eligible for naturalization and that the petitioners should decide his application for suspension of deportation on that basis; he also seeks an injunction restraining petitioners "from exercising their power, authority or discretion in respect of suspension of deportation of plaintiff on the theory that plaintiff is not eligible to naturalization in the United States" (R. 7).

Petitioners moved to dismiss (R. 8), and the District Court granted the motion (R. 12). On appeal, that order was reversed. The Court of Appeals concluded that an alien subject to deportation, who is not in custody, may challenge the deportation order and proceedings under the Ad-

ministrative Procedure Act, and probably also under the Declaratory Judgment Act. In exercising its asserted power to review the administrative determination in this proceeding, the court held that since respondent was subject to an order of deportation at the time he applied for relief from military service, he was not then "residing in the United States," for the purpose of the Selective Training and Service Act, and his application for relief from military service was therefore a nullity since he was not actually subject to such service. Because of this holding, the court found it unnecessary to require a hearing on respondent's allegations as to the information given to him by the local Selective Service board concerning the effect of his filing of the exemption form.

REASONS FOR GRANTING THE WRIT

I

If the views of the Court of Appeals are correct, an alien dissatisfied with an order of deportation may contest it by direct review in the courts, under the Administrative Procedure or Declaratory Judgment Acts, before he is taken into custody under the order. We believe the assumptions implicit in that position cannot be supported, and that such a far-reaching and significant departure from the established acceptance of habeas corpus as the only remedy open to an alien subject to deportation should be reviewed by this Court.

1. Congress has entrusted the conduct of depor-

tation proceedings to the Attorney General and has unqualifiedly commanded that his order in such proceedings "shall be final." Sec. 19 (a), Immigration Act of 1917, 8 U. S. C. 155 (a), *supra*, p. 3. The determinations in such proceedings are entirely administrative, and are not subject to "the customary scope of judicial review which obtains under other statutes." *Estep* v. *United States*, 327 U. S. 114, 122, 123; see *Sunal* v. *Large*, 332 U. S. 174, 177 fn. 3. It is indisputable, of course, that an alien in custody under an order of deportation can question the propriety of the restraint through a writ of habeas corpus. *Wong Yang Sung* v. *McGrath*, No. 154, this Term, decided February 20, 1950. But the scrutiny in such cases is collateral rather than direct. And the court's inquiry is limited to determining whether the order was issued in conformity with law, after a fair hearing, and on the basis of evidence which supports the finding. *Vajtauer* v. *Commissioner*, 273 U. S. 103, 106; *Tisi* v. *Tod*, 264 U. S. 131, 133. In other words, the judicial inquiry is solely into the jurisdiction of the detaining immigration authorities. *Estep* v. *United States*, *supra*. Such circumscribed opportunity for court review is equivalent to that available in other situations where administrative decisions are expressly given finality by statute, such as determinations of selective service boards. *Estep* v. *United States*, *supra*; *Eagles* v. *Samuels*, 329 U. S. 304, 311, 312.

Prior to the Administrative Procedure Act and the Declaratory Judgment Act, the courts held, without exception, that habeas corpus was the only remedy for questioning the deportation process.[1] Thus, in *Fafalios* v. *Doak*, 50 F. 2d 640 (C. A. D. C.), certiorari denied, 284 U. S. 651, the court concluded that a bill in equity to cancel an order of deportation and to require discretionary action was not a proper remedy. The court found that a writ of habeas corpus, after the alien was in custody, afforded the only appropriate method of relief since

> the writ will accord him an adequate and complete remedy. Should appellant's contention be sustained, every alien, by merely giving bail, might test the legality of the deportation proceedings through a bill in equity in the District of Columbia, instead of through a writ of habeas corpus in the proper district.

A like holding rejecting a bill in equity is found in *Rash* v. *Zurbrick*, 6 F. Supp. 390 (E. D. Mich.). Similarly, in *Poliszek* v. *Doak*, 57 F. 2d 430 (C. A. D. C.), and *Kabadian* v. *Doak*, 65 F. 2d 202 (C. A. D. C.), certiorari denied, 290 U. S. 661, petitions for writs of prohibition were re-

[1] Compare the decisions holding that collateral challenge of final orders of Selective Service may be made in criminal prosecutions for noncompliance, as well as in habeas corpus. *Estep* v. *United States*, 327 U. S. 114; *Gibson* v. *United States*, 329 U. S. 338; *Cox* v. *United States*, 332 U. S. 442. Those cases presented exceptional considerations, not found in the instant case.

jected on the ground that habeas corpus was the proper remedy. A bill in equity seeking a declaratory judgment, prior to the Declaratory Judgment Act, likewise was found inappropriate. *Darabi* v. *Northrup,* 54 F. 2d 70 (C. A. 6). See also *Impiriale* v. *Perkins,* 66 F. 2d 805 (C. A. D. C.), certiorari denied, 290 U. S. 690; *Bata Shoe Co. Inc.* v. *Perkins,* 33 F. Supp. 508, 509 (D. D. C.).

2. The court below was of the view that the Administrative Procedure Act had modified these rulings and that relief under that statute is now appropriate to forestall deportation. It relied most heavily upon Section 10 of the Act, 5 U. S. C. 1009, describing it as a "sweeping grant of review authority" which authorized a declaratory re-examination of deportation orders (R. 19). We do not read the statute as conferring such broad authority, or as designed to repeal or modify the provisions of the immigration laws which invest with finality the Attorney General's order in a deportation case, or as providing a substitute for a habeas corpus proceeding in deportation cases.

Section 10 of the Administrative Procedure Act does not purport to authorize unlimited judicial review of every executive or administrative determination. While subsection (a) (*supra,* p. 4) is couched in broad language and permits review by any person "aggrieved," its prescriptions obviously must be read in harmony with the

introductory language of Section 10 and the limitations found in other parts of the same section. The clause which prefaces the entire section declares that its provisions apply "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * *." Judicial review may be precluded expressly or impliedly, and such preclusion may extend to all or part of the administrative determination. See *Ludecke* v. *Watkins*, 335 U. S. 160, 163–164. In our view, direct judicial review of a deportation order, such as the review contemplated by the Administrative Procedure Act, is precluded by the immigration statute's flat declaration that the Attorney General's decisions are final. The existence of the habeas corpus remedy does not alter this conclusion, for such a collateral challenge to a deportation order—testing the jurisdiction of the administrative agency—is not the type of allowable "judicial review" contemplated by the introduction to Section 10. See *Sunal* v. *Large*, 332 U. S. 174, 177, fn. 3; *Estep* v. *United States*, 327 U. S. 114, 122, 123.[2]

[2] In addition, we believe that in the instant case such limitation of review is fortified by the second stated exception which relates to "agency action * * * by law committed to agency discretion." The application for suspension of deportation is addressed to the Attorney General's discretion. It is comparable to the exercise of executive or judicial clemency following conviction for crime. See *Solesbee* v. *Balkcom*, No. 77, this Term, decided February 20, 1950; *Hiatt* v. *Compagna*, 178 F. 2d 42 (C. A. 5).

Moreover, the body of Section 10 indicates that habeas corpus is still the proper method for attacking an administrative decision of deportation. Section 10 (b) specifies, in cases like the instant one where there is no special statutory review proceeding, that the form of relief shall be "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction," and Section 10 (c) provides for judicial review, where none is provided by statute, of "every final agency action for which there is no other adequate remedy in any court." In immigration matters, habeas corpus has long been the only "applicable form of legal action," and its adequacy has been judicially attested. See *Bridges* v. *Wixon,* 326 U. S. 135; supra, pp. 10–12. Reading these provisions of the Procedure Act in their entirety, and in conjunction with the immigration statutes, as we are required to do by the introductory clause of Section 10, it seems proper to conclude that deportation orders retain such finality as they previously had, and that they may not be challenged except collaterally in habeas corpus proceedings.[3]

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[3] To the extent that judicial inquiry may be had in attempts to challenge the exercise of discretion in denying suspension of deportation, it can be invoked in a habeas corpus attack upon the deportation order. *United States ex rel. Weddeke* v. *Watkins,* 166 F. 2d 369 (C. A. 2), certiorari denied, 333

The legislative history of the Administrative Procedure Act strengthens this view that Section 10 was not designed to alter existing modes of judicial review. Thus, Representative Walter, chairman of the subcommittee of the House Committee on the Judiciary which sponsored this legislation, made the following statement on the floor of the House on May 24, 1946, shortly before the bill's enactment (Sen. Doc. 248, 79th Cong., 2d Sess., p. 369):

> These provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law. It does, however, constitute a statutory adoption of traditional forms of action in cases where Congress had made no contrary provision for judicial review.

Another significant comment, also prior to approval of the legislation, is found in the following interpretive statement of the Attorney General, placed in the Congressional Record on May

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U. S. 876. Thus, the review sought in the instant case would have been equally available in habeas corpus.

Although neither the complaint nor the decision of the court below in the present suit purports to offer a direct challenge to the deportation process, it seems evident that their thrust is aimed directly at the order of deportation. The application for suspension of deportation is made in the deportation proceeding, and seeks to forestall deportation. When that application is rejected, as it was in the instant case, deportation is ordered. The court's intervention has the effect of preventing execution of the order of deportation.

25, 1946 by Representative Hobbs (Sen. Doc. 248, *supra,* p. 415):

> Section 10 as to judicial review does not, in my view, make any real changes in existing law. This section in general declares the existing law concerning judicial review. It is an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court. I know that some agencies are quite concerned about the phraseology used in section 10 for fear that it will change the existing doctrine of judicial review which has been settled for the particular agency concerned. I feel sure that should this section be given the interpretation which is intended, namely, that it is merely a restatement of existing law, there should be no difficulty for any agency. We may in a sense look at section 10 as an attempt by Congress to place into statutory language existing methods of review.

See also Sen. Doc. 248, *supra,* pp. 83–84, 224–229, 406–407, and *Attorney General's Manual on the Administrative Procedure Act,* p. 93.

In sum, we believe that Section 10 of the Administrative Procedure Act was not intended to supersede the principles of judicial scrutiny which had been developed for deportation cases. The language of the statute, its legislative history, and the contemporaneous expressions negate such an assumption. On the contrary, it seems

evident that this section merely proclaims a codification of existing modes of review. Only when no adequate remedy was formerly provided does Section 10 purport to enlarge the method of obtaining judicial examination.

3. The court below also calls upon the Declaratory Judgment Act to buttress its holding that Section 10 of the Administrative Procedure Act permits a suit of this type (R. 18–19, 21–22). But in prescribing for relief to be granted by a court in "a case of actual controversy within its jurisdiction", the Declaratory Judgment Act manifestly did not purport to require the adjudication of every disputed issue, or every class of controversy. In order to qualify for the benefits of that statute, the controversy must be justiciable (*Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227), must not solicit an advisory or speculative pronouncement (*Coffman* v. *Breeze Corps.,* 323 U. S. 316), and must relate to a situation where the need is immediate, rather than remote or uncertain (*United Public Workers* v. *Mitchell,* 330 U. S. 75). Moreover, an application for a declaratory judgment is addressed to the sound discretion of the court, which should be exercised only "where the interests of justice will be advanced and an adequate and effective judgment may be rendered" (*Federation of Labor* v. *McAdory,* 325 U. S. 450, 462), and especially where governmental action is involved this discretion must be cautiously exer-

cised in the public interest. See *Eccles* v. *Peoples Bank,* 333 U. S. 426, 431, 434.

For these reasons, and in the light of the general acceptance of habeas corpus as the proper vehicle, it has been supposed, at least until the decision in the instant case, that the declaratory judgment action was not a proper method for challenging an order of deportation. At least in form, and perhaps also in substance, such a suit would constitute a direct attack upon the Attorney General's order which the immigration statute directs "shall be final". Habeas corpus affords a proper remedy, and no real need for the additional procedure can be shown. *Supra,* pp. 10–12; *infra,* pp. 22–23. On the other hand, opening this door would burden the courts in the District of Columbia with a large volume of litigation which could be decided more expeditiously and completely in habeas corpus proceedings conducted at the real situs of the controversy.[4] These are reasons which should impel the courts to refuse to entertain the action for a declaratory judgment, in the exercise of sound discretion. *Kaminer* v. *Clark,* 177 F. 2d 51 (C. A. D. C.), certiorari denied, 338 U. S. 873.[5] They also argue

[4] Cf. *Ahrens* v. *Clark,* 335 U. S. 188; see *infra,* pp. 21–22.

[5] The court below attempted to distinguish its own decision in the *Kaminer* case on the ground that it involved a person already in custody, hence habeas corpus was an exclusive remedy. This does not seem an adequate basis for differentiation, since habeas corpus would become equally available, in the present situation, as soon as the alien is taken into custody.

against the availability of the remedy itself, regardless of discretion.

We cannot agree with the court below that *Perkins* v. *Elg*, 307 U. S. 325, furnishes any support for the relief sought by respondent. The Court there passed upon a claim to American citizenship, which was basic jurisdictional element in the prospective deportation proceedings. Indeed, Miss Elg could have demanded a trial *de novo* on that issue even after deportation had been ordered. *Ng Fung Ho* v. *White*, 259 U. S. 276.[6] Accordingly, she was held entitled to a prior judicial declaration on the issue of her American citizenship. Moreover, an order requiring the issuance of an American passport also was sought against the Secretary of State, who would not have been a party in any habeas corpus proceeding. The instant case presents no such fundamental jurisdictional issue. It concerns solely a question of statutory interpretation which can be resolved in habeas corpus proceedings.

It is significant that in the intervening interval of eleven years no court has attempted, until now, to rely on the *Elg* case as authority for a declara-

[6] Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. 903, now authorizes specifically the bringing of court action to obtain a declaratory judgment upon a claim to American citizenship. In this connection, it is significant that when Congress enacted this special provision it used express language to accomplish its purpose to permit such suits to be brought, at the wish of the complainant, in the District of Columbia court or in the district of his residence.

tory judgment suit to review every order of deportation. Aliens aggrieved by such orders have been able to obtain a speedy and complete determination of their claims by invoking the writ of habeas corpus. See *Bridges* v. *Wixon,* 326 U. S. 135.

4. Nevertheless, the Court of Appeals for the District of Columbia Circuit, in the instant case, and the Court of Appeals for the Third Circuit, in *Trinler* v. *Carusi,* 166 F. 2d 457, have now joined in adopting an expansive interpretation of the Administrative Procedure Act (and the Declaratory Judgment Act), and have sanctioned a right to judicial review of deportation orders beyond the limitations previously recognized.[7] Although the district courts have been divided on this issue, it is likely that the agreement in the views expressed by the Courts of Appeals in the only two circuits where the issue has been adjudicated may now be regarded as setting a pattern for future determinations. This likelihood is accentuated by the recent holdings in the Second and Third Circuits that most suits for

[7] In the *Trinler* case, the court deemed appropriate a "petition for review" which challenged the deportation order. Although the *Trinler* case subsequently was found to have been abated (168 F. 2d 1014), the Court of Appeals for the Third Circuit has since manifested its continued adherence to the doctrine of that case. *Podovinnikoff* v. *Miller,* No. 10071, decided January 30, 1950. The Court of Appeals for the Second Circuit has deemed it unnecessary to rule directly on this point. *Connor* v. *Miller,* 178 F. 2d 755; *Azzolini* v. *Watkins,* 172 F. 2d 897, 898.

review of deportation orders under the Administrative Procedure Act, if they are maintainable at all, must be brought in the District of Columbia, where the Attorney General and the Commissioner of Immigration and Naturalization have their official residences.[8] *Connor* v. *Miller*, 178 F. 2d 755 (C. A. 2); *Podovinnikoff* v. *Miller*, (C. A. 3, No. 10071), decided January 30, 1950. Consequently, the ruling of the court below will govern the forum in which all future actions may be, and probably must be, brought.

a. Thus, the decision in the instant case will most likely have far-reaching consequences to the operations of the Immigration and Naturalization Service, which is confronted with the possibility of meeting applications for judicial review in the District of Columbia in thousands of deportation proceedings annually.[9] Added delay would result, in some and probably large measure, from concentration of this litigation in the overcrowded courts of the District of Columbia, where civil actions already encounter a calendar delay of at least one year after issue

[8] A writ of habeas corpus, on the other hand, could issue only in the district in which the alien is detained. *Ahrens* v. *Clark*, 335 U. S. 188. In this connection, see the remarks of Congressman Walter on the continuance by the Administrative Procedure Act of "the venue arrangements under existing law" (quoted *supra*, p. 15).

[9] During the fiscal year 1948, there were 31,540 deportation hearings and deportations actually occurred in 20,371 cases. *Annual Report*, Commissioner of Immigration and Naturalization (1948), p. 23.

is joined. Since declaratory or review actions fall into the stream of general litigation, they would meet this delay, as well as other deferments incident to formal pleadings, motions, etc. This situation will also tend to encourage dilatory and frivolous proceedings, in a district far removed from an alien's residence or prospective place of detention, since even an insubstantial complaint will almost inevitably assure some delay. Habeas corpus proceedings, on the other hand, are not placed in the general stream of civil litigation. By their inherent nature and by statutory command they must be resolved expeditiously. 28 U. S. C. 2243. See Mr. Justice Frankfurter, concurring, in *Estep* v. *United States*, 327 U. S. 114, 141. The opportunities for pressing frivolous and dilatory attacks on deportation orders consequently are minimized in habeas corpus proceedings. Moreover, if an anticipatory suit may be maintained to procure a declaratory ruling, there is nothing to prevent the alien from pursuing the attack in habeas corpus proceedings after he is defeated. Multiplication of remedies addressed to the same issue thus would be fostered.

b. The court below appears to suggest that habeas corpus is a harsh vehicle for challenging a deportation order, since the alien would have "to go into custody" and "to sacrifice his possessions in preparations for leaving the country" (R. 22).

But this seems to us an unrealistic approach to the problem. In the first place, the deportation order never comes as a sudden surprise to the respondent. He has faced the imminent possibility of deportation for some time while he was in legal custody, although usually at liberty on bail, and while his case moved through the processes of administrative adjudication. Upon request, he is given adequate opportunity to wind up his affairs. If he desires to test the deportation order he may surrender and obtain a speedy adjudication in habeas corpus, with opportunity for appeal, which eventually may even reach this Court. Upon presenting a claim that is *prima facie* meritorious, he may procure release on bail, either by the administrative authorities or by the court, pending a final determination.[10] Thus, his situation in habeas corpus would not be appreciably different from what it was previously when he was at liberty on bail pending determination of the administrative proceeding. Of course, in any case when his pleas are finally unsuccessful, there will come a time when he must wind up his affairs. But that is a contingency which he must anticipate and plan to meet.

[10] For example, in *Bridges* v. *Wixon*, 326 U. S. 135, Bridges surrendered for the purpose of testing the deportation order and was forthwith admitted to bail by the district court pending its decision. The bail was continued during the three-year period in which the case was under consideration in the courts.

c. A further reason why an alien who is not in custody should be barred from utilizing the Administrative Procedure or Declaratory Judgment Acts is that the administrative process is not complete. As described in Section 19 of the Immigration Act of 1917, deportation consists of three parts: An order of deportation (following arrest and hearing), taking into custody, and physical deportation. Only the first of these stages has been traversed in the instant case. The remaining two hardly are inconsequential, since until the immigration officers move to execute the order of deportation there is no certainty that deportation actually will be accomplished. The deportation order may be rescinded or ameliorated. Or it may prove impossible to effect expulsion because the deportee's country will not accept him. In such cases, travel documents cannot be obtained, and no attempt is made to effectuate the deportation order. Finally, the alien may be able to bar deportation through special legislation enacted by Congress.

Thus, judicial intervention is premature until the alien is taken into custody. The situation is comparable to that of a person finally classified by a selective service board who attempts to obtain judicial review of that classification before

the effort is made fully to execute the order. Cf. *Falbo* v. *United States*, 320 U. S. 549, 553.[11]

II

Even if the court below is sustained in its ruling that relief under the Administrative Procedure Act or Declaratory Judgment Act was appropriate, we believe it erred on the merits of the claim. Concededly, respondent, as a neutral alien, in 1942 executed and filed an application for relief from military service (Form DSS 301). He was granted the exemption he requested and never was called upon to perform any military service. Not until November 1946, did he seek to withdraw his exemption application. Under the law, the filing of such an application debarred him from becoming a citizen. *Supra*, p. 5. Yet the court found that he was not bound by the

[11] It should also be pointed out that in the instant type of case the court is hardly in a position to render a complete, decisive judgment. At most, it would adjudicate only one segment of the controversy. There is nothing in the order below, for instance, to prevent the Attorney General from again denying suspension of deportation, in the exercise of his discretion, and decreeing that the alien be deported on the outstanding charge that he has remained in the United States longer than permitted by law. The respondent then might challenge the new administrative finding by another declaratory or review proceeding or by habeas corpus. And even if the Attorney General were to give favorable consideration to the application for suspension of deportation, his determination would be merely intermediate, since under the statute the relief cannot become effective unless it is approved by Congress. *Supra*, p. 3.

consequences of this document, although he had willingly accepted its benefits.

The mandate of the Selective Training and Service Act was directed against every citizen and "every other male person residing in the United States". Respondent never contended before the selective service board that he was not residing in the United States. He did register, without protest, and never sought exemption on a claim of nonresidence. Nor has he alleged in his complaint herein that he was not then, or is not now, a resident of the United States. He has lived in the United States continuously since 1939, and has been employed for most of that time. Nevertheless, the Court of Appeals holds that the insecurity of his immigration status proves that he did not sufficiently "reside" in the United States for the purposes of the Selective Training and Service Act (R. 24–28).

The determination of the court below on this phase of the case is irreconcilably opposed to that of the Court of Appeals for the Second Circuit in *Benzian* v. *Godwin*, 168 F. 2d 952, certiorari denied, 335 U. S. 886, which adopted the construction of similar legislative requirements announced by the Attorney General in 39 Op. Atty. Gen. 504. Although there are some factual deviations, the reasoning in the two decisions is directly in conflict, as the court below admits (R. 26–28).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1950.

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 34

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES ET AL., PETITIONERS

v.

PEDER KRISTIAN KRISTENSEN, ALSO KNOWN AS PETER KRISTEN KRISTIANSEN, ALSO KNOWN AS PETER CHRISTENSEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 13–25) is reported at 179 F. 2d 796. The District Court wrote no opinion (See R. 9).

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1949 (R. 25). By order of the Chief Justice, dated March 17, 1950, the time for filing a petition for certiorari was ex-

tended to and including March 27, 1950 (R. 28). Petition for a writ of certiorari was filed March 24, 1950, and was granted May 15, 1950 (R. 29). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Attorney General's refusal to suspend deportation of an alien under Section 19 (c) of the Immigration Act of 1917 presents a justiciable question, where his suspension of deportation must be affirmatively approved by a concurrent resolution of the Congress.

2. Whether the Congress has made the Attorney General's decision in alien deportation cases subject to judicial review otherwise than in habeas corpus proceedings.

3. Whether the court below erred in finding that when respondent sought and obtained, as a neutral alien, exemption from military service during World War II, he was not "residing" in the United States and therefore did not become ineligible for suspension of deportation.

STATUTES INVOLVED

Section 19 (a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U. S. C. 155 (a), directs that any alien found subject to deportation "shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * In every case where any person is

ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final."

Section 19 (c) of the same Act, as amended, 62 Stat. 1206, 8 U. S. C. (Supp. II) 155 (c), provides that:

> (c) In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the

reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law.

The Declaratory Judgment Act, 28 U. S. C. 2201, directs that:

> In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, provides in part as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

Section 3 (a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U. S. C. App. 303, provided in part:

> Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States * * * shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

STATEMENT

Respondent, an alien who is the subject of deportation proceedings, brought this action, initiated by a "Complaint for Declaratory Judgment and Injunction" (R. 1–5), in the District Court for the District of Columbia, against the Attorney General, the Commissioner of Immigration and Naturalization, and the members of the Board of Immigration Appeals. The suit was brought under the Declaratory Judgment Act and the Administrative Procedure Act (R. 1–2). The

complaint makes the following allegations (R. 2–4): Respondent, a Danish citizen, entered the United States as a temporary visitor on August 17, 1939. He was admitted for a period of sixty days to visit relatives and to attend the New York World's Fair. He asserts that the outbreak of the war in Europe prevented his departure, and that he obtained two extensions of stay, each for six months. Deportation proceedings were commenced against him in May, 1940, on the ground that he had violated his visitor's status by obtaining employment in the United States and had thereby remained in the United States longer than permitted by law. On May 15, 1941, he was ordered deported to Denmark, but deportation was deferred until the cessation of hostilities. He has remained in the United States since then, has continued to be employed in this country, and married an American citizen on October 12, 1944. (R. 2–3.)

Respondent registered under the Selective Training and Service Act of 1940. However, he executed and filed an application for relief from military service as a neutral alien (Form DSS 301) on or about March 30, 1942. This was done, the complaint alleges, after he had been informed by a member of his local Selective Service board that since he was already subject to deportation, the signing of form DSS 301 would have no effect on his deportation and that he was precluded from obtaining American citizenship. He asserts

that he would not have filed the form if he had known of its effect upon his deportability and eligibility for naturalization. His request for exemption was honored, and he never was called upon to perform military service for the United States. He alleges also that after learning that the filing of form DSS 301 might affect his deportation, he applied, in November 1946, to withdraw his application for exemption. (R. 4.)

The unexecuted warrant of deportation which had been outstanding against him since 1941 was withdrawn on or about June 10, 1946. The deportation proceeding was reopened to permit respondent to apply for suspension of deportation, pursuant to Section 19 (c) of the Immigration Act of 1917, on the basis of his marriage to an American citizen. After consideration of the evidence adduced in connection with the application for suspension of deportation, the Board of Immigration Appeals, on June 27, 1947, denied the plea for suspension of deportation on the ground that respondent's application for relief from military service as a neutral alien had, under Section 3 (a) of the Selective Training and Service Act, rendered him ineligible for naturalization, and consequently disqualified him for suspension of deportation (see *supra*, pp. 3, 6). However, the Board of Immigration Appeals directed that he be permitted to depart from the United States voluntarily in lieu of deportation, if he so desired. A motion for re-

consideration of that order was denied. The complaint further alleges that the Board of Immigration Appeals has "found to exist all facts necessary to authorize the suspension of deportation of plaintiff," except for the finding that he is ineligible for naturalization, and that "it appears that the deportation of plaintiff would be suspended if the Board were of the opinion that plaintiff is eligible to naturalization in the United States" (R. 3). The Board's application of Section 3 (a) of the Selective Training and Service Act is asserted to be erroneous (R. 4).

Respondent has not departed from the United States, nor has any order of deportation been entered against him; he is not in custody (R. 4). He prays for a declaratory judgment that he is eligible for naturalization and that the petitioners should decide his application for suspension of deportation on that basis; he also seeks an injunction restraining petitioners "from exercising their power, authority or discretion in respect of suspension of deportation of plaintiff on the theory that plaintiff is not eligible to naturalization in the United States" (R. 5).

Petitioners moved to dismiss (R. 5), and the District Court granted the motion (R. 9). On appeal, that order was reversed. The Court of Appeals concluded that the Attorney General's decision to deport an alien may be reviewed by the courts under the Administrative Procedure

Act, and probably also under the Declaratory Judgment Act, in a suit for a declaratory judgment. In exercising its asserted power to review the administrative determination in this proceeding, the court held that since respondent was subject to an order of deportation at the time he applied for relief from military service, he was not then "residing in the United States," for the purpose of the Selective Training and Service Act, and his application for relief from military service was therefore a nullity since he was not actually subject to such service. Because of this holding, the court found it unnecessary to require a hearing on respondent's allegation that he was misled by information given to him by the local Selective Service board concerning the effect of his claim of exemption.

SUMMARY OF ARGUMENT

I

The Attorney General's suspension of the deportation of an alien pursuant to Section 19 (c) is not final, but must be affirmatively approved by a concurrent resolution of the Congress. Since neither the decision of the Attorney General nor any judicial action with respect to his decision is binding upon the Congress, the respondent is in effect asking for an advisory opinion such as Federal courts have refused to render since *Hayburn's* case.

II

The Immigration Act of 1917 provides that the decision of the Attorney General in alien deportation cases shall be "final". This has long been held to mean that deportation orders are subject only to the limited collateral review afforded by habeas corpus proceedings. The court below erroneously concluded that by reason of the Declaratory Judgment Act and the Administrative Procedure Act deportation orders may now be directly reviewed by the courts in suits for declaratory judgments. The Declaratory Judgment Act merely provided a new remedy; it did not purport to confer upon Federal courts jurisdiction otherwise withheld from them. The Congress, by making the judicial review provisions of Section 10 of the Administrative Procedure Act applicable "Except so far as * * * statutes preclude review" expressly preserved whatever finality it had accorded to administrative action by such statutes as the Immigration Act. There is no evidence that the Congress intended to make deportation orders reviewable otherwise than in habeas corpus. The practical problems of venue and calendar delay which would be involved by concentrating the review of such orders in declaratory judgment proceedings in the District of Columbia, further indicate that Congress never contemplated making that remedy

available by virtue of either the Declaratory Judgment Act or the Administrative Procedure Act.

III

On the merits, the court below erred in holding that the respondent, when he applied for and obtained exemption from military service as a neutral alien, was not "residing" in the United States, and therefore did not become ineligible for citizenship and for suspension of deportation. The legislative history of the Selective Training and Service Act makes clear the legislative purpose to impose liability for military service upon aliens in the respondent's position. The extension, in December 1941, of liability for service to non-declarant aliens, together with the simultaneous grant of power to the President to establish exempt categories of non-declarant aliens, can only mean that Congress intended generally to impose liability for service upon all aliens, and to leave the making of the necessary exceptions to Presidential regulations, rather than to endless litigation over such questions as residence. Those regulations provided a procedure by which the respondent could have asserted his alleged non-resident status. Having failed to use that remedy, and having requested and enjoyed exemption from military service as a neutral alien, he must accept the consequences which the Congress attached to such exemption. The argument that he

did not then "reside" in the United States because he had been declared deportable and could not leave this country because of the war, is entirely unrealistic and technical, in view of the facts that he had been here over two years before he claimed exemption from military service, married here during the war, evidenced no interest in his status with respect to citizenship until the fighting was over, and now desires to remain here. In any event, it is clear that Congress intended to impose liability for service upon all aliens, resident or non-resident, except those excepted as non-residents in administrative procedures which the respondent failed to exhaust.

ARGUMENT

I

THE ATTORNEY GENERAL'S DENIAL OF SUSPENSION OF DEPORTATION UNDER SECTION 19 (c) OF THE IMMIGRATION ACT OF 1917 DOES NOT PRESENT A JUSTICIABLE QUESTION UNDER ARTICLE III OF THE CONSTITUTION

Before coming to the questions considered by the court below, we feel obliged to bring to the Court's attention a question as to whether the case presents a justiciable controversy within the jurisdiction of the Federal courts. Although this point was not presented to the court below or in the petition for certiorari, it would seem to be of such a fundamental jurisdictional nature that it may be raised by a party for the first time in this Court or by the Court *sua sponte*. *United States* v. *Corrick*, 298 U. S. 435, 440.

The decision of the Attorney General in granting suspension of deportation pursuant to Section 19 (c) is not final in the sense that nothing more remains to be done to permit an otherwise deportable alien to remain in the United States. If the deportation of an alien is suspended by the Attorney General pursuant to Section 19 (c) for more than six months, "a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension." If during the session of Congress at which a case is thus reported or before the end of the following session of Congress, "the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings." If by the end of such following session, "the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law."[1]

It is clear, therefore, that when the Attorney General acts favorably upon an application for suspension of deportation pursuant to Section 19 (c), he is in effect making a recommendation to the Congress. The Congress, or either House, may reject his recommendation for any reason

[1] Prior to the 1948 amendment of Section 19 (c) (62 Stat. 1206) the decision of the Attorney General in suspending deportation was final, subject to disapproval by a concurrent resolution of the Congress.

whatsoever, and thus require deportation of the alien.

The decisions of this Court indicate that such an administrative recommendation cannot be made the subject of the exercise of judicial power because a judicial decision in favor of the alien is in no way binding upon the Congress, which has reserved to itself the final decision on such suspension.[2]

Since *Hayburn's* case, 2 Dall. 409, which reflects the views of five justices of this Court sitting on circuit, this Court has held without variation that the courts created by Article III of the Constitution may only act judicially, that judicial action contemplates the making of judgments which will be binding on the parties, and that a judgment is not judicial if it is subject to

[2] Upon this analysis of the Attorney General's function under Section 19 (c), we do not reach the question of whether his function is so completely discretionary as to present no issue for judicial review. Section 19 (c), in providing a possibility of relief for persons otherwise deportable, provides that the Attorney General "*may*" suspend deportation. The discretionary nature of this power is emphasized by the fact that Congress has reserved the ultimate decision to itself. The lower Federal courts have characterized as discretionary the Attorney General's power under Section 19 (c). *Weddeke* v. *Watkins*, 166 F. 2d 369 (C. A. 2), certiorari denied, 333 U. S. 876; *Sleddens* v. *Shaughnessy*, 177 F. 2d 363 (C. A. 2); *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (C. A. 2); *Adel* v. *Shaughnessy*, 183 F. 2d 371 (C. A. 2). It should be noted that Section 10 of the Administrative Procedure Act provides for judicial review "Except so far as * * * agency action is by law committed to agency discretion."

review by an administrative official. *Hayburn's* case itself involved a statute empowering the Federal judges to make decisions as to Revolutionary War pensions, but these decisions would then be subject "to the consideration and suspension of the secretary of war, and then to the revision of the legislature." In *United States* v. *Ferreira,* 13 How. 40, the statute authorized the judges of the Florida district court to pass upon certain claims; if the judges "shall decide in favor of the claimants the decisions, with the evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof." The Court, speaking through Mr. Chief Justice Taney, reaffirmed the doctrine of *Hayburn's* case, stating that the power sought to be imposed upon the Court "subject to the revision of a Secretary *and of Congress,* could not be executed by the court as a judicial power." 13 How. 50 (italics supplied).

Again in *Gordon* v. *United States,* 117 U. S. 697, decisions of the Court of Claims were not to become effective until after an appropriation therefor "shall be estimated for by the Secretary of the Treasury"; it depended upon the Secretary "to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant" (p. 699). This was held to render the action of the Court of Claims

nonjudicial, and to bar appeal to the Supreme Court in Court of Claims cases. The opinion states that Congress cannot "authorize or require this Court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties" (p. 702), and that "when the decision of the court was subject to the revision of a Secretary *and Congress*, it was not the exercise of a judicial power, and could not therefore be executed by the court" (p. 703) [italics supplied]. Chief Justice Taney concluded that "no principle of constitutional law has been more firmly established or constantly adhered to" (p. 704). These decisions have been repeatedly cited with approval in subsequent cases. See particularly *In re Sanborn*, 148 U. S. 222, 226; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 483–484; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 456–457; *Muskrat* v. *United States*, 219 U. S. 346, 362; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 400–401. In the *Sanborn* case, the Court declared, in the course of holding that it had no jurisdiction to review a special finding of the Court of Claims:

> Such a finding is not made obligatory on the department to which it is reported—certainly not so in terms—and not so, as we think, by any necessary implication. We

> regard the function of the Court of Claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made, by the statute, the final and indisputable basis of action either by the department or by congress.
>
> It is therefore, within the scope of the decision in *Gordon* v. *United States*. * * *

And in *United States* v. *Jefferson Electric Co.*, 291 U. S. at 400–401 the Court stated, with respect to a statute which might be construed as authorizing a judgment which would be paid only if the claimant proved to the Commissioner that he was entitled to it:

> Decisions of this Court have long since established that it is not within the province of courts created by or under the judiciary article of the Constitution to give or review judgments of that character, for they are not final or binding adjudications.

More recently, in *Chicago and Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 113–114, in considering the reviewability of an order of the Civil Aeronautics Board which was subject to the approval or disapproval of the President, this Court stated:

> To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most ob-

noxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action. *Hayburn's Case,* 2 Dall. 409; *United States* v. *Ferreira,* 13 How. 40; *Gordon* v. *United States,* 117 U. S. 697; *In re Sanborn,* 148 U. S. 222; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423; *Muskrat* v. *United States,* 219 U. S. 346; *United States* v. *Jefferson Electric Co.,* 291 U. S. 386.

Here, the ultimate decision on the suspension of deportation is as completely within the control and discretion of the Congress as the decision in the *Waterman* case was "within the President's exclusive, ultimate control." Here, as in that case, no judicial action can be effective to suspend the deportation of the respondent. Even if the courts conclude that the Attorney General has erroneously interpreted Section 3 (a) of the Selective Training and Service Act, and even if the Attorney General thereafter acts to suspend the

deportation of the respondent, the Congress remains entirely free to refuse to approve such suspension, even on the ground originally given by the Attorney General. Indeed, the Attorney General will remain free to deny relief in the exercise of his discretion.

It may be contended that the respondent is entitled to have his eligibility for suspension correctly determined so that his case will at least be presented to the Congress. However, a similar argument was in effect rejected in all the cases from *Hayward's* case to the *Waterman* case. The question always is, not whether a party might be benefited by the courts' action, but whether the courts can dispose of the controversy decisively—in a manner binding upon the parties. Here the courts cannot decide the respondent's eligibility for naturalization in a manner binding upon the Congress. Thus, the respondent is asking the courts for a mere advisory opinion to the Congress that he is eligible for naturalization. Since Washington's time, the Federal courts have refused to give such opinions even when requested by one of the other branches of the Government.

We submit, therefore, that where an alien about to be deported challenges only the administration of the provisions of Section 19 (c) for suspension of deportation, he does not present an issue justiciable by Federal courts.[3]

[3] Even though it be contended that the court below, as a District of Columbia court, may be vested with nonjudicial

II

THE PROVISION OF THE IMMIGRATION ACT THAT "THE DECISION OF THE ATTORNEY GENERAL SHALL BE FINAL" IN DEPORTATION CASES PRECLUDES JUDICIAL REVIEW OF DEPORTATION ORDERS EXCEPT IN HABEAS CORPUS PROCEEDINGS

A. Preliminary Analysis

In this case, an order for the deportation of the respondent was withdrawn, and the deportation proceeding against him was reopened, to permit him to apply for suspension of deportation under Section 19 (c) of the Immigration Act of 1917 (8 U. S. C. (Supp. II) 155 (c)). His application has been denied by the Board of Immigration Appeals on the ground that he is ineligible for naturalization. However, the Board has extended to him the privilege of voluntarily departing from the United States in lieu of deportation. If he does not depart from the United States within a reasonable time, the deportation order will be reissued and he will be deported.

It is the Government's position that the declaratory judgment proceeding initiated by the respondent is simply an attempt by him to obtain direct judicial review of the Attorney General's decision that he must be deported from the United States. The respondent disagrees with this view

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functions, nothing in the habeas corpus statute, the Declaratory Judgment Act, or the Administrative Procedure Act suggests that the Congress intended to vest in District of Columbia courts nonjudicial functions in relation to Section 19 (c) of the Immigration Act of 1917. See *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 400–401.

of the procedural issue. First, he contends that no deportation order is outstanding against him but that, rather, he has been ordered to depart voluntarily from the United States. We wish to emphasize that the respondent has not been ordered to depart voluntarily; voluntary departure at his own expense in lieu of deportation is a privilege which the Attorney General is authorized by Section 19 (c) of the Immigration Act of 1917 to grant to a deportable alien who has proved good moral character for the preceding five years. While it is true that there is not presently outstanding a deportation order against the respondent and, *a fortiori,* he is not in that custody for deportation which he could challenge in habeas corpus proceedings, the respondent also insists that the administrative process is complete. We agree, in the realistic sense that a deportation order probably will issue and he will be deported if he does not depart voluntarily. We do not here raise the defense that the administrative decision is not yet final for the purpose of review.[4]

[4] In the courts below, the Government failed to urge that until an order for the respondent's deportation was issued, in the event of his failure to depart voluntarily, the administrative action had not become final for the purpose of review by habeas corpus or otherwise. We believe that this circumstance properly raised would have required dismissal of the complaint. Accordingly, we wish to make clear that by our position in this Court we are not conceding that deportation action can be final prior to the issuance of the deportation order.

Nevertheless, while the purpose of respondent's action is to avert his deportation, he contends that he is not attacking the administrative decision that he shall be deported. Rather, he contends that he is merely attacking the decision that by reason of Section 3 (a) of the Selective Training and Service Act of 1940 he is ineligible for naturalization and therefore ineligible for suspension of deportation under Section 19 (c) of the Immigration Act.

The administrative process leading to the issuance of a deportation order is a single one. One of the issues to be determined before an alien is deported is whether he is entitled to suspension of deportation under Section 19 (c). In many cases, evidence relating to eligibility for such discretionary relief is offered and received in the main deportation hearing. In other cases, as here, the deportation proceeding is reopened to consider that issue. The issue of suspension from deportation can arise only in a deportation proceeding because it becomes relevant only if the alien is otherwise deportable. The entire proceeding has as its purpose to determine whether the alien shall be deported. If the respondent's contention is upheld, there will be created possibilities for piecemeal review of the deportation process since presumably he could later raise other issues in habeas corpus. More broadly, all sorts of legal issues relating to deportation

could be singled out for judicial review prior to the taking of the alien into custody, under the respondent's contention.

However, the court below clearly considered that the procedural issue was whether an administrative decision that an alien should be deported can be challenged otherwise than in habeas corpus. This question was answered affirmatively by the court below, as it had been in *Trinler* v. *Carusi,* 166 F. 2d 457 (C. A. 3), abated 168 F. 2d 1014. It was upon the procedural issue as thus stated and decided by the court below that the Government petitioned for a writ of certiorari.

B. In Providing That the Attorney General's Decision Should Be "Final", Congress Deliberately Made Deportation Orders Subject Only to Limited and Collateral Review in Habeas Corpus Proceedings

Section 19 (a) of the Immigration Act of 1917 provides that "In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final." The clear purpose of this provision was to preclude judicial review of the Attorney General's decisions in alien deportation cases insofar as the Congress could do so under the Constitution. Thus, in the report of the Senate Committee on Immigration, Sen. Rep. 352, 64th Cong., 1st sess., it is stated (p. 16):

> The last provision * * *, while new in this particular location, is not new in the

> law, the courts having repeatedly held that in the cases of aliens arrested for deportation, as well as in the cases of those excluded in our ports, the decision of the administrative officers is final, and the Supreme Court having in several decisions regarded the case of the alien arrested for deportation as practically a deferred exclusion (*The Japanese Immigrant* Case, 189 U. S. 86; *Pearson* v. *Williams,* 202 U. S. 281, etc.).

In the same Act, the Congress repeated its command, first stated in 1888, that administrative orders excluding aliens should be final (Sec. 17, 8 U. S. C. 153). As the Senate Report points out, these provisions for administrative finality were consistent with the prior administration and interpretation of the immigration laws.

It has always been recognized that the power to exclude or expel aliens is a necessary power of every national government, and that it is a political function, relating to the external affairs of the nation, which may be vested in executive officers.[5] Thus, with respect to the admission or exclusion of aliens, this Court declared in *Lem Moon Sing* v. *United States,* 158 U. S. 538, 547, that:

> The power of Congress to exclude aliens altogether from the United States, or to

[5] *The Chinese Exclusion Case,* 130 U. S. 581, 603; *Ekiu* v. *United States,* 142 U. S. 651, 653, 659, 660. In *Oceanic Steam Navigation Co.* v. *Strahan,* 214 U. S. 320, 339, the Court declared: "ever no conceivable subject is the legislative power of Congress more complete."

> prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.[6]

With respect to the deportation of aliens, this Court long ago stated in *Fong Yue Ting* v. *United States,* 149 U. S. 698, 713:

> The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.

And in the apt language of *Mahler* v. *Eby,* 264 U. S. 32, 39, 40:

> The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations

[6] This Court's most recent expression is found, of course, in *Knauff* v. *Shaughnessy,* 338 U. S. 537, 542, 543: "The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. * * * Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible officer of the sovereign, such as the Attorney General. The action of the [Attorney General] under such authority is final and conclusive. Whatever the rule may be concerning the deportation of persons who may have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."

> in respect thereto entered into with foreign governments. * * * The sovereign power to expel aliens is political and is vested in the political departments of the Government. Even if the executive may not exercise it without Congressional authority, Congress can not exercise it effectively save through the executive.[7]

Thus, the Congressional command in 1917 that the decisions of the Attorney General in alien deportation cases should be final was consistent with the recognized political nature of the power to exclude or expel aliens from the United States. Of course, the Congress could not and did not suspend the privilege of the writ of habeas corpus with respect to aliens taken into custody for the purpose of deportation. Unless the Congress suspends the privilege of the writ "in cases of rebellion or invasion," it is available to test the validity of every personal detention, including the detention of aliens for deportation. These principles were set forth concisely by Chief Justice Stone, dissenting in *Bridges* v. *Wixon,* 326 U. S. 135, 167, as follows:

> Congress has committed the conduct of deportation proceedings to an administrative officer, the Attorney General, with no

[7] Among the cases in which similar statements appear are *Fong Yue Ting* v. *United States*, *supra*, 149 U. S. at 713; *Turner* v. *Williams*, 194 U. S. 279; *The Japanese Immigrant Case*, 189 U. S. 86, 97; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275; *Lewis* v. *Frick*, 233 U. S. 291, 300.

> provision for direct review of his action by the courts. Instead, it has provided that his decision shall be "final", 8 U. S. C. § 155, as it may constitutionally do. *Zakonaite* v. *Wolf*, 226 U. S. 272, 275, and cases cited. Only in the exercise of their authority to issue writs of habeas corpus, may courts inquire whether the Attorney General has exceeded his statutory authority or acted contrary to law or the Constitution.

Chief Justice Stone's view of the Congressional purpose in giving finality to the Attorney General's decision finds confirmation in the fact that before and after 1917 the Congress has provided frequently and specifically for direct judicial review of the decisions of other administrative agencies. For example, the orders of the Federal Trade Commission, Securities and Exchange Commission, Civil Aeronautics Board, Federal Power Commission, Federal Communications Commission and the National Labor Relations Board are subject to direct review in the United States Courts of Appeals. Decisions of the Social Security Board and of deputy Commissioners under the Longshoremen's and Harborworkers' Compensation Act are reviewable in the United States District Courts. Orders of the Interstate Commerce Commission, the Maritime Board and the Department of Agriculture (under certain statutes) are subject to direct judicial review by a three-judge district court pursuant

to the Urgent Deficiencies Act of 1913.[8] Nevertheless, while enacting these varied and detailed provisions for direct judicial review, and while occasionally amending the immigration laws, the Congress has left unchanged its command that the decision of the Attorney General in deportation cases shall be final.[9]

Again, in enacting other legislation similar to the deportation statute which deals with restraints upon personal liberty, the Congress has made it clear that when it provides in such legislation that administrative action shall be "final", it intends to cut off direct judicial review and to permit only the collateral review in habeas corpus proceedings required by the Constitution. Thus,

[8] See 2 Vom Baur, *Federal Administrative Law*, 787–838.

[9] Indeed, in the pending proposed recodification of the immigration and nationality laws, S. 3455, 81st Cong., 2d Sess., introduced by the Chairman of the Senate Judiciary Committee after a protracted study by that Committee, the provisions for finality of deportation orders are retained and augmented. Sec. 106 of that bill provides that:

"Notwithstanding the provisions of any other law—

"(a) determinations of fact by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court;

"(b) determinations of law by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court except through the writ of habeas corpus; and

"(c) the exercise of discretionary authority conferred upon administrative officers by this Act or regulations issued thereunder shall not be subject to review by any court."

Article 76 of the new Articles of War, enacted in 1950, P. L. 506, 81st Cong., 2d sess., provides that:

> The appellate review of * * * the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, * * * shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74, and the authority of the President.

The legislative history of this provision makes it clear that the Congress intended only to restate the existing rule that the decisions of courts martial are subject only to the limited collateral judicial review afforded by habeas corpus proceedings. H. Rep. 491, 81st Cong., 1st Sess., p. 35; Sen. Rep. 486, 81st Cong., 1st Sess., p. 32. Similarly, the Selective Training and Service Act of 1940 provided that the decisions of draft boards should be "final". This Court held that draft board decisions could be challenged in habeas corpus proceedings by an inductee who had exhausted his administrative remedies and reported for induction, and that a registrant who has not been actually inducted into the armed forces may attack a board's order as arbitrary

or illegal in defense to a criminal prosecution for violation of the order. *Estep* v. *United States*, 327 U. S. 114. In either event, judicial intervention does not occur until it is absolutely clear that the board's order is going to be actually carried out.

In *Estep* v. *United States, supra,* at pp. 122–123, in considering the provision in the Selective Training and Service Act that draft board orders shall be final, this Court stated:

> The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

The Court then added in a footnote:

> That is the scope of judicial inquiry in deportation cases where Congress has made the orders of deportation "final." *Chin Yow* v. *United States*, 208 U. S. 8; *Ng Fung Ho* v. *White, supra; Mahler* v. *Eby*, 264 U. S. 32; *U. S. ex rel. Vajtauer* v.

Commissioner of Immigration, 273 U. S. 103; *Bridges* v. *Wixon*, 326 U. S. 135.

In *Sunal* v. *Large*, 332 U. S. 174, 177, the Court, in considering whether to allow habeas corpus where a possible appeal had not been taken, stated that "We therefore lay to one side cases such as *Bridges* v. *Wixon*, 326 U. S. 135, * * * where the order of the agency under which petitioner was detained was not subject to judicial review." In *Eagles* v. *Samuels*, 329 U. S. 304, 311, 312, a habeas corpus proceeding seeking to review a selective service board order, it was said that:

> The function of *habeas corpus* is exhausted when it is ascertained that the agency under whose order the petitioner is held had jurisdiction to act. * * * Deprivation of petitioner of basic and fundamental safeguards, an assertion of power to act beyond the authority granted the agency, and action without evidence to support its order, are familiar examples of the showing which is necessary. * * * If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, * * * or that there was no evidence to support the order, * * * the inquiry is at an end.

Thus, this Court has recognized that the provision for administrative finality in the Immigration Act not only limits judicial review of deportation orders to habeas corpus, but signifi-

cantly limits the scope of review. It is not often that Congress provides that administrative action shall be "final", as it has with respect to exclusion and deportation orders. But when it has done so, the courts have given effect to the legislative purpose of assuring speedy and effective administrative action.[10]

To say, as did the court below following the Court of Appeals for the Third Circuit in *Trinler* v. *Carusi,* 166 F. 2d 457, 461, that the availability of habeas corpus proves that deportation orders are reviewable, is to ignore both the command of the Congress that the Attorney General's decision shall be final and the traditionally narrow scope of habeas corpus. Of course, the legality of every detention of an individual under the authority of and within the United States can be tested by habeas corpus. But habeas corpus is not a substitute for appeal or for direct judicial review. It is an extraordinary remedy which "comes in from outside" to determine the existence of jurisdiction or authority to detain. Habeas corpus is not concerned with whether the administrative decision is correct or even probably correct. In deportation cases, habeas corpus determines only whether an alien is being deported for a cause specified by the Con-

[10] As this Court observed in *The Japanese Immigrant Case,* 189 U. S. 86, 101, the statutory provisions relating to deportation are designed to "secure the prompt, vigorous action contemplated by Congress."

gress, whether there is evidence in support of the Attorney General's decision, and whether the administrative procedure was fair. *Vajtauer* v. *United States,* 273 U. S. 103, 106; *Bilokumsky* v. *Tod,* 263 U. S. 149, 157. Recent decisions of this Court have reemphasized that habeas corpus reaches only the elements of jurisdiction. *Hiatt* v. *Brown,* 339 U. S. 103; *Estep* v. *United States, supra.*

Prior to the Declaratory Judgment Act and the Administrative Procedure Act, the courts rejected every attempt to challenge deportation orders otherwise than in habeas corpus proceedings. Thus, in *Fafalios* v. *Doak,* 50 F. 2d 640 (C. A. D. C.), certiorari denied, 284 U. S. 651, the court concluded that a bill in equity to cancel an order of deportation and to require discretionary action was not a proper remedy. The court found that a writ of habeas corpus, after the alien was in custody, afforded the only appropriate method of relief since

> the writ will accord him an adequate and complete remedy. Should appellant's contention be sustained, every alien, by merely giving bail, might test the legality of the deportation proceedings through a bill in equity in the District of Columbia, instead of through a writ of habeas corpus in the proper district.

A like holding rejecting a bill in equity is found in *Rash* v. *Zurbrick,* 6 F. Supp. 390 (E. D.

Mich.). Similarly, in *Poliszek* v. *Doak*, 57 F. 2d 430 (C. A. D. C.), and *Kabadian* v. *Doak*, 65 F. 2d 202 (C. A. D. C.), certiorari denied, 290 U. S. 661, petitions for writs of prohibition were denied on the ground that habeas corpus was the proper remedy. A bill in equity seeking a declaratory judgment, prior to the Declaratory Judgment Act, likewise was found to be inappropriate. *Darabi* v. *Northrup*, 54 F. 2d 70 (C. A. 6). See also *Impiriale* v. *Perkins*, 66 F. 2d 805 (C. A. D. C.), certiorari denied, 290 U. S. 690; *Bata Shoe Co., Inc.* v. *Perkins*, 33 F. Supp. 508, 509 (D. D. C.).

The court below conceded that before enactment of the Declaratory Judgment Act and the Administrative Procedure Act "habeas corpus was the sole means of questioning the jurisdiction, fairness and conformity to statute of deportation proceedings" (R. 14). It was that court's view, and in this we agree, that the decisive procedural question which confronts us is whether those statutes added to the available methods of review.

C. The Declaratory Judgment Act of 1934 Did Not Alter or Enlarge the Review of Deportation Orders

In 1934, the Congress enacted the Declaratory Judgment Act providing that "In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of any appropriate pleading, may declare the rights and other legal rela-

tions of any interested party seeking such declaration, whether or not further relief is or could be sought." In arriving at its conclusion that Section 10 of the Administrative Procedure Act permitted the review of deportation orders in suits for declaratory judgments, the court below apparently concluded that the declaratory judgment remedy had been available since the enactment of the Declaratory Judgment Act in 1934. Indeed, we believe that this must have been an element in the decision below, since, in the Administrative Procedure Act, the Congress expressly disavowed any purpose of abrogating provisions in other statutes for administrative finality.

In providing for a judicial determination of rights by a Federal court in "a case of actual controversy within its jurisdiction," the Declaratory Judgment Act manifestly did not purport to require the adjudication of every disputed issue, or every class of controversy. In order to proceed under that Act, the controversy must be justiciable (*Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227), must not solicit an advisory or speculative pronouncement (*Coffman* v. *Breeze Corps.*, 323 U. S. 316), and must relate to a situation where the need is immediate, rather than remote or uncertain (*United Public Workers* v. *Mitchell*, 330 U. S. 75). Moreover, an application for a declaratory judgment is addressed to the sound

only "where the interests of justice will be advanced and an adequate and effective judgment may be rendered" (*American Federation of Labor* v. *McAdory*, 325 U. S. 450, 462). And especially where governmental action is involved this discretion must be cautiously exercised in the public interest. See *Eccles* v. *Peoples Bank*, 333 U. S. 426, 431, 434.

Nothing in the Declaratory Judgment Act or in its legislative history suggests that the Act was intended to make reviewable administrative action which for reasons of statute or policy was not previously reviewable. Administrative action which is not yet reviewable because of failure to exhaust administrative remedies is not made reviewable by the Declaratory Judgment Act. *Macauley* v. *Waterman S. S. Co.*, 327 U. S. 540; *Federal Power Commission* v. *Arkansas Power and Light Co., per curiam*, 330 U. S. 802. Administrative action which the Congress has made completely discretionary does not create a justiciable issue in a suit for a declaratory judgment. Similarly administrative action which the Congress has made final so far as it may constitutionally do is not made any more reviewable by the existence of the declaratory judgment remedy.

The Declaratory Judgment Act simply provided a new and additional remedy in situations where the courts could already grant relief. Thus, when Congress made available in the Federal courts the

port to provide for direct judicial review of administrative action which it had declared to be final, subject only to the determination of the existence of jurisdiction in habeas corpus proceedings, or which it had otherwise withdrawn from the jurisdiction of Federal courts. As this Court recently stated in *Skelly Oil Co.* v. *Phillips Co.*, 339 U. S. 667, 671–2:

> "The operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240. Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. When concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the Constitution and Acts of Congress confine them, "jurisdiction" means the kinds of issues which give right of entrance to federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act. * * * But the requirements of jurisdiction—the limited subject matters which alone Congress had authorized the District Courts to adjudicate—were not impliedly repealed or modified.

In fact, this was recognized by the court below when it recently held in *Goldstein* v. *United States*, decided July 3, 1950, that the sentence of a court martial could not be challenged in a suit for a declaratory judgment. In so holding, the court stated: "The Declaratory Judgment

Act does not aid the appellant, because that Act does not operate to enlarge the jurisdiction of the District Courts; it is available only where jurisdiction already exists [citing *Skelly Oil Co.* v. *Phillips Co.*]."

Indeed, apart from the instant case, it has never been suggested that a suit under the Declaratory Judgment Act could be substituted for habeas corpus to challenge a deportation order. While the court below cited to the contrary *Perkins* v. *Elg*, 307 U. S. 325, we think it is clear that the decision in that case does not stand for the proposition that deportation orders generally may be challenged in declaratory judgment proceedings. In that case, in its specification of errors in the Supreme Court, the Government did not question the propriety of the declaratory judgment suit. Moreover, the Court there passed upon a claim of American citizenship, which was a basic jurisdictional element in the prospective deportation proceedings. Indeed, Miss Elg could have demanded a trial de novo on that issue even after deportation had been ordered. *Ng Fung Ho* v. *White*, 259 U. S. 276.[11] Accordingly, she

[11] Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. 903, now authorizes specifically the bringing of court action to obtain a declaratory judgment upon a claim to American citizenship. In this connection, it is significant that when Congress enacted this special provision it used express language to accomplish its purpose to permit such suits to be brought, at the wish of the complainant, in the District of Columbia court or in the district of his

was held entitled to a prior judicial declaration on the issue of her American citizenship. Furthermore, an order requiring the issuance of an American passport also was sought against the Secretary of State, who would not have been a party in any habeas corpus proceeding. The instant case presents no such fundamental jurisdictional issue. It involves only a question of statutory interpretation which can be resolved in habeas corpus proceedings.

It is significant that in the intervening period of eleven years no court has attempted, until now, to rely on the *Eig* case as authority for a declaratory judgment suit to review every decision of the Attorney General relating to alien deportation. Moreover, if such actions will lie to review deportation orders, it is equally arguable that they can be used to review orders excluding aliens from the United States, or indeed any other administrative orders which the Congress has declared shall be final. Considering the long history of the statutory provision for finality of both deportation and exclusion orders, it is impossible to believe that the Congress intended, *sub silentio,* to make such orders directly reviewable in declaratory judgment proceedings.

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residence. And it is significant also that Congress never has made any comparable specific provision for a declaratory judgment action by an alien to test the propriety of a deportation order.

D. The Administrative Procedure Act Did Not Alter the Review of Deportation Orders

The court below held that under Section 10 of the Administrative Procedure Act habeas corpus proceedings were no longer the exclusive method for judicial review of deportation orders, and that such orders could be reviewed in an action for a declaratory judgment. The Court of Appeals for the Third Circuit came to a similar conclusion in *Trinler* v. *Carusi*, 166 F. 2d 457, abated 168 F. 2d 1014, in holding that a "petition for review" would lie to challenge a deportation order. We believe that both decisions were erroneous in that they failed to give effect to the introductory clause of Section 10 under which its later provisions apply "Except so far as * * * statutes preclude judicial review." The purpose of this clause is to maintain in effect whatever degree of finality Congress has accorded to particular administrative action by other statutes such as the Immigration Act. The legislative history of Section 10 and the general nature of its provisi ns require that full effect be given to its introductory clause.

The legislative history of Section 10.—The sweeping judicial review provisions of the Walter-Logan bill were one of the principal reasons for its veto by President Roosevelt in 1940. As the Attorney General pointed out in an analysis accompanying the veto, House Doc. 986, 76th Cong., 3d Sess., p. 11:

> The bill provides that any party to an administrative proceeding who is aggrieved by the final decision of the agency may secure review in a circuit court of appeals or the Court of Appeals for the District of Columbia. Already under existing statutes specific decisions affecting the rights of individuals are made subject to judicial review. This act, however, does not confine review to the specific matters heretofore allowed, but sweeps into the judicial hopper all manner of questions which have never before been considered appropriate for judicial review.

In sharp contrast with the judicial review provisions of the Walter-Logan bill, Section 10 through all of its evolution from the recommendations of the Attorney General's Committee on Administrative Procedure in 1941, has been regarded as a statement of general principles rather than as a broad revision of existing law.

Like the Administrative Procedure Act as a whole, Section 10 had its origin in the recommendations of the Attorney General's Committee on Administrative Procedure in 1941. The majority of the Committee recommended against general legislation dealing with judicial review, and suggested that "When and if the Congress is dissatisfied with the existing review of particular types of administrative determinations, it then may and should, by specific and purposive legislation, provide for such change as it desires. Only

by addressing itself to particular situations, and not by general legislation for all agencies and all types of determinations alike, can Congress make effective and desirable change." *Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 92.

The minority members of the Committee desired to go somewhat further, and they drafted as part of their recommendations a section on judicial review which is the ancestor of Section 10 of the Administrative Procedure Act. *Report,* pp. 245–246. However, the minority of the Committee made it clear that it did not entirely disagree with the majority, for the minority members stated that "The situation should be clarified by a statement of legislative policy in no uncertain terms, but at the same time it is unnecessary to go beyond certain simple and recognized principles which have long obtained. The several provisions of this section are designed merely to state a policy * * * without disturbing existing express statutory provisions for or against judicial review". *Report,* p. 245. And they emphasized their position by providing in their proposed section on judicial review that "all statutory provisions specifically precluding judicial review * * * shall remain valid and binding". *Report,* p. 246.

The minority views as to judicial review, which are largely embodied in Section 10 of the Act, were at all times described by their proponents as

a statement of general principles which was not intended to provide a rigid procedure for judicial review applicable to all agencies.[12]

In the 1945 hearings before the House Judiciary Committee, the aims of the proponents of this measure were described even more specifically by Mr. Carl McFarland, then Chairman of the American Bar Association's Special Committee on Administrative Law, Sen. Doc. 248, pp. 83–84:[13]

> We think there must be a section on judicial review within the statute; we think it will be very helpful; we think it will simplify the subject to the extent of indicating to the lawyer or businessman or farmer or laborer who may be involved that his rights of review are of such and such a kind; but we do not believe the principle of review or the extent of review can or should be greatly altered. We think that the basic exception of administrative discretion should be preserved—must be preserved. We believe that about all the statute should or could do would be to

[12] The majority and minority members also made similar statements in testifying before the Senate Judiciary Committee in 1941. See *Hearings Before a Subcommittee of the Committee on the Judiciary, U. S. Senate, Seventy-seventh Congress, First Session on S. 674, S. 675, and S. 918* (1941), at pp. 838, 845, 849, 850, 1350–1359, and 1400.

[13] Mr. McFarland was one of the minority group on the Attorney General's Committee. Much of the legislative history of the Administrative Procedure Act is compiled in Sen. Doc. 248, 79th Cong., 2d Sess., herein referred to as Sen. Doc. 248.

> state the form of action, the type of acts that are reviewable in accordance with the present law, the authority of the courts to grant temporary relief so that review may be useful, but that the scope of review should be as it now is.

Comparable expressions by the chief legislative supporters of this legislation buttress the conviction that Section 10 of the Administrative Procedure Act was not intended to alter drastically existing modes of judicial review. Thus, Representative Walter, chairman of the subcommittee of the House Committee on the Judiciary which sponsored this legislation, made the following statement on the floor of the House on May 24, 1946, shortly before the bill's enactment(Sen. Doc. 248, p. 369):

> These provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law. It does, however, constitute a statutory adoption of traditional forms of action in cases where Congress had made no contrary provisions for judicial review.

And most pertinently, Senator McCarran, Chairman of the Senate Judiciary Committee, stated (Sen. Doc. 248, p. 311):

> Substantive law, enacted by statute by the Congress of the United States, granting a review or denying a review is not inter-

fered with by this bill. We were not setting ourselves up to abrogate acts of Congress.[14]

The Attorney General previously had made similar explicit statements to the effect that the Section 10 of the Administrative Procedure Act was a restatement of existing law in letters to the Chairman of the Senate[15] and House[16] Judiciary Committees; furnished at their request. The Attorney General's letter and comprehensive analysis were appended to and made part of the final report on this bill by the Senate Judiciary Committee.[17]

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[14] The Senate Judiciary Committee's Print of June 1945, likewise indicated that Section 10 of the Administrative Procedure Act was not designed to supplant existing modes of judicial review, and that "the recognition of the so-called common-law types of review is in accord with the authoritative statement of existing law." Sen. Doc. 248, p. 37.

[15] "This section, in general, declares the existing law concerning judicial review." Sen. Doc. 248, p. 229.

[16] "It [the proposed legislation] also restates the law governing judicial review of administrative action." Sen. Doc. 248, p. 407. This has been the view of the Department of Justice throughout the history of this legislation. Acting Attorney General Biddle took the same position in a memorandum submitted to the Senate Judiciary Committee during the 1941 hearings referred to in note 12, *supra*, at p. 1452. The *Attorney General's Manual on the Administrative Procedure Act* (1947) also declares, p. 93, that: "The provisions of section 10 constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions." See also Sen. Doc. 248, p. 415.

[17] Sen. Doc. 248, p. 223, et seq. In another connection, this Court found that such use of a letter from the Attorney General served, "in the absence of contradiction by the re-

We do not contend that Section 10 has no effect upon judicial review of administrative action generally. Nevertheless, it is clear that its provisions were intended to be read with the pre-existing mass of statutory and judicial materials on judicial review. This is required by the generality of the provisions of Section 10, if for no other reason. However, this underlying concept of the section is not left to inference, because by its express terms it leaves intact other statutory provisions giving finality to administrative action, conferring unreviewable discretionary powers upon such agencies, and prescribing the form and venue of judicial review. It is not surprising, therefore, that there is practically no reference in the legislative history to the possible impact of Section 10 upon the established rule that deportation and exclusion orders are reviewable only in habeas corpus proceedings.[18] The general provi-

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port, as an indication of the Committee's opinion on the intended effect" of the legislation. *American Stevedores* v. *Porello*, 330 U. S. 446, 452.

[18] The only references to judicial review in relation to that process which have come to our attention are the comments of Major Schofield, then head of the Immigration and Naturalization Service, in testifying in the 1941 hearings before the Senate Judiciary Committee, referred to in note 12 *supra*, at p. 569. Major Schofield pointed out that habeas corpus had always provided ample opportunity for review of deportation orders and objected to any enlargement of the opportunities for review in the courts. See also a general approval of proposals to exempt immigration functions by Carl McFarland, speaking for the minority of the Attorney General's Committee. *Id.*, p. 1349, 1390.

sion in the introductory clause, preserving whatever finality or unreviewability the Congress in other statutes had conferred upon particular administrative actions, resolved all such problems of the coverage of Section 10 by reference to existing law.

The statutory language.—Section 10 must be related to the operations of many administrative agencies performing diverse functions under statutes in which Congress has made special provisions for administration and review. The only method by which the general principles of Section 10 can be reconciled with other and often detailed arrangements which the Congress has made for judicial review is by giving full effect to the introductory clause of Section 10. The principles of Section 10 govern "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion". It is important to note that the exception in clause (1) is applicable not only where some other statute forbids judicial review altogether, but also "so far as" or the extent to which Congress has forbidden review.[19] For example, many regulatory statutes provide that the agency's order shall be final unless a petition for review is filed in a cir-

[19] The significance of the introductory clause of Section 10 is emphasized by Davis in *The Scope of Review of Federal Administrative Action*, 50 Col. L. R. 559, 561 (1950), and in *The Attorney General's Manual on the Administrative Procedure Act*, 94–95 (1947).

cuit court of appeals within 60 days after the issuance of the agency's order. Clearly, such provisions for finality remain effective pursuant to the introductory clause of Section 10. Similarly, a Federal civil service employee who alleges unlawful removal from office can obtain judicial review only on the question of whether the procedures of the Civil Service Act were followed. *Levine* v. *Farley*, 107 F. 2d 186 (C. A. D. C.), certiorari denied, 308 U. S. 622. Since the only rights accorded to the employee are these procedural rights, the introductory clause of Section 10 continues to limit judicial review in this area to the question of whether the statutory procedure was followed. Generally, the intended effect of the introductory clause of Section 10 is to provide a dovetailing of the general principles of that section with the specific statutory provisions which the Congress has moulded to particular situations.

It is clear, therefore, that the qualifying introductory clause of Section 10 is not restricted to situations where some other statute precludes judicial review altogether, as in the Act of March 20, 1933 (38 U. S. C. 705), relating to veterans' benefits. Rather, the general principles of Section 10 are inapplicable "*so far as* statutes preclude judicial review". Where the Congress, in an area where it may constitutionally do so, provides that administrative findings of fact shall be conclusive, the general principles of Section 10

will govern the review of questions of law. Where, as in the Immigration Act and the Selective Training and Service Act, the Congress deliberately provides that the administrative decisions shall be "final," the only review permitted by Section 10 is that required by the Constitution—in habeas corpus proceedings. In other words, where the Congress, in the substantive statute involved, has specifically limited the time, mode or scope of judicial review, such provisions are to be given effect under Section 10 by reason of its introductory clause "Except so far as statutes preclude judicial review". Obviously, where the Congress has provided that the administrative decision shall be "final," knowing full well, as we have shown above, that under the Constitution "final" means subject to collateral and limited review in habeas corpus proceedings, that legislative purpose and understanding should be given effect under the introductory clause of Section 10.

There remains the possible argument that the first introductory exception to Section 10 applies only where some other statute expressly and in terms prohibits judicial review, as does 38 U. S. C. 705. Any such contention is completely answered by the legislative history of Section 10. As originally introduced in both Senate and House, it provided for judicial review of agency action "except so far as statutes *expressly* preclude judicial review—" [Italics added] (S. 7, H. R. 1203, 79th

Cong., 1st Sess.). Had Section 10 been enacted in this form, it might be possible to argue that a statutory provision that agency action shall be "final" is not sufficient to "preclude" judicial review. The Senate Committee on the Judiciary, to which S. 7 was referred, issued a preliminary print of the bill in which the word "expressly" was deleted without specific explanation, but with the observation that the introductory clause of Section 10 was intended to "state the two present general or basic situations in which judicial review is precluded—* * * where * * * statutes withhold judicial powers."[20] (Sen. Doc. 248, p. 36.) The significance of the deletion, and the manner in which it is controlling of the present inquiry, is apparent from the Attorney General's comments on the bill subsequently submitted to the Chairmen of both Judiciary Committees. The Attorney General said (Sen. Doc. 248, pp. 229–230, 413):

> SECTION 10. This section, in general, declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it, or insofar as agency action is by law committed to agency discretion. A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Ex-

[20] The other introductory exception is "Except so far as * * * agency action is by law committed to agency discretion." See page 15, footnote 2, *supra*.

amples of such interpretation are: *Switchmen's Union of North America* v. *National Mediation Board* (320 U. S. 297); * * *

In any event, the decisions of this Court and of the court below have made it clear that a statute need not in express terms "preclude" judicial review to come within the introductory clause of Section 10. In *Ludecke* v. *Watkins,* 335 U. S. 160, 163–164, in considering the Alien Enemy Act of 1798, which was completely silent as to judicial review or administrative finality, this Court noted that "As Congress explicitly recognized in the recent Administrative Procedure Act, some statutes 'preclude judicial review'. * * * Barring questions of interpretation and constitutionality, the Alien Enemy Act of 1798 is such a statute. Its terms, purpose, and construction leave no doubt". Similarly, in *Kirkland* v. *Atlantic Coast Line R. R. Co.,* 167 F. 2d 529, certiorari denied, 335 U. S. 843, the court below held that the same reasons that were held to preclude judicial review in *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, remained effective to accomplish the same result under the introductory clause of Section 10.

The court below appeared to believe that the only problem under Section 10 was that of the form of the proceeding. That is, it had already concluded that the statutory provision for finality was meaningless because of the availability of habeas corpus (R. 15), and that deportation orders

had been reviewable in declaratory judgment proceedings since *Perkins* v. *Elg, supra*. In fact, it concluded that "Determination of appellant's rights at this juncture detracts not one whit from the administrative process for the Attorney General has already reached his 'final' decision and refused to reconsider it" (R. 19). Clearly, the court below had concluded that the statutory provision for finality had no bearing upon the timing or scope of judicial review, and that the only problem presented was the choice of a convenient form of review under paragraph (b) of Section 10 (R. 16–17). To the contrary, as we have shown, the Congress intended and still intends to accord to the Attorney General's deportation orders such finality as it may do constitutionally, and it has preserved such finality by the introductory clause of Section 10.

We think it clear that nothing in Section 10 (a), (b) and (c) of the Administrative Procedure Act supports the decision below. The introductory clause expressly provides that the following provisions shall not wipe out the provisions of other statutes providing for finality or eliminate the discretion which such statutes as Section 19 (c) of the Immigration Act vest in administrative officers. Paragraph (a) relates to the persons who are entitled to judicial review, paragraph (b) to the form and venue of judicial review proceedings, while paragraph (c) defines the administrative action which is subject to

judicial review. These provisions, like all of Section 10, are subject to the qualifying introductory clause, "Except so far as * * * statutes preclude judicial review". Thus, Section 10 (b) cannot be construed, as it was by the court below, as permitting review here by a suit for a declaratory judgment, on the theory that since Congress had not provided "a special statutory review proceeding" for deportation orders, such a suit was authorized by the reference to "any applicable form of legal action (including actions for declaratory judgments * * *)." Even without the word "applicable", Section 10 (b) must be read subject to the introductory clause of the section. However, the use of the word "applicable" further indicates that the use of common law remedies must be governed by considerations not set forth in the Act. With respect to the review of deportation cases, we need only refer through the introductory clause of Section 10 to the command of the Immigration Act that the decision of the Attorney General shall be "final", to find that the only remaining or "applicable" form of action is in habeas corpus proceedings. Thus, the reference in paragraph (b) to declaratory judgments actions, like the reference to habeas corpus proceedings, is only illustrative of the remedies which may be applied under appropriate circumstances, as they have in the past, where the Congress has neither precluded review nor made special review arrangements.

Similarly, the introductory clause of Section 10 limits the provision of paragraph (c) that "every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review". At the most, this can only mean that administrative action, as to which Congress has neither precluded review nor made express provision for review, shall be subject to judicial review.[21] That it is subject to the introductory clause is evident from the explanation in the Senate Comparative Committee Print, as follows: "the so-called nonstatutory or common-law type of review was recognized by the Attorney General's Committee as properly obtaining wherever special statutory review is not provided by Congress and legislation does not indicate that judicial review is precluded or withdrawn. The exceptions stated in the introductory clause of section 10 appear to set forth the proper type of issues not subject to judicial review." Sen. Doc. 248, pp. 37–38.

It is clear, therefore, that the introductory clause of Section 10 was intended to leave intact whatever degree of finality the Congress had given to particular administrative action by other statutes. The finality accorded to the Attorney General's orders in alien deportation cases by Section 19 of the Immigration Act can be pre-

[21] This construction is urged by Dickinson in *The Federal Administrative Procedure Act and the Administrative Agencies* (1947) pp. 562–564.

served only by restricting the mode, timing and scope of judicial review of such proceedings to the collateral review available in habeas corpus proceedings. In habeas corpus proceedings, an alien facing deportation can raise every question that he would be entitled to raise in an action such as the present one.[22]

E. The Practical Consequences of the Decision Below Also Require Its Reversal

In support of its decision, the court below stated that "To compel him (the respondent) to go into custody before he can have his rights determined would be to defer to formalism and order the performance of a useless act, an act which may require him to sacrifice his possessions in preparation for leaving the country" (R. 18).

It is of course true that the alien must be taken into custody before he can commence habeas corpus proceedings. Also, the courts usually do not grant bail when the writ is first applied for as the expedited proceedings are usually completed quickly. However, if the proceedings are prolonged or upon appeal to the higher Federal

[22] Among the cases in which habeas corpus proceedings have been utilized to question orders denying suspension of deportation are *Weddeke* v. *Watkins*, 166 F. 2d 369 (C. A. 2), certiorari denied, 333 U. S. 876; *Walther* v. *District Director*, 175 F. 2d 693 (C. A. 2); *Bartsch* v. *Watkins*, 175 F. 2d 245 (C. A. 2); *Sleddens* v. *Shaughnessy*, 177 F. 2d 363 (C. A. 2); *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (C. A. 2); *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999 (C. A. 2); *Zabadlija* v. *Garfinkel*, 173 F. 2d 222 (C. A. 3); *Petition of Kavadias*, 177 F. 2d 497 (C. A. 7); *Adel* v. *Shaughnessy*, 183 F. 2d 371 (C. A. 2).

courts, bail is normally allowed, as in such cases as *Bridges* v. *Wixon,* 326 U. S. 135, and *Wong Yang Sung* v. *McGrath,* 339 U. S. 33. See also Rule 45 of the Rules of this Court. Most important of all, even after the deportation order has been upheld in habeas corpus proceedings, the alien may and frequently does obtain from the Immigration and Naturalization Service a postponement of his actual deportation together with a temporary release from custody in order to wind up his affairs. Thus, his situation in habeas corpus would not be appreciably different from what it was previously when he was at liberty on bail pending determination of the administrative proceeding. Of course, when his objections are finally unsuccessful, there will come a time when he must wind up his affairs. But that is a contingency which he must anticipate and plan to meet.

In contrast to the relatively minor inconvenience imposed upon a small number of aliens are the practical burdens which the decision below would impose upon the courts and upon the Immigration and Naturalization Service. In the fiscal year 1949, 20,040 aliens were deported from the United States pursuant to formal deportation orders, while 276,000 deportable aliens departed voluntarily. *The Immigration and Naturalization Systems of the United States,* a report of the Senate Committee on the Judiciary, Sen. Rep. 1515, 81st Cong., 2d Sess. (1950), p. 864. Of these 20,040 formal deportations, 16,430 were to

Mexico and Canada upon the ground of illegal entry or stay (i. e., previously deported or excluded, remaining longer than authorized, entered without proper documents or without inspection or by false statements.) *Annual Report of the Attorney General* (1949), p. 700. During the same year, hearings were completed in 13,062 deportation cases. Also during the fiscal year 1948,[23] the Federal courts disposed of 258 writs of habeas corpus in deportation cases as follows: sustained 26, dismissed 149, while 83 were withdrawn. *The Immigration and Naturalization Systems of the United States,* p. 870. These statistics strongly indicate that in a large proportion of the cases habeas corpus proceedings may have been utilized solely for purposes of delay.

Habeas corpus proceedings are expedited, 28 U. S. C. 2243, thus minimizing the opportunity and temptation for using the writ for purposes of delay. However, if suits for declaratory judgment may be employed to challenge deportation orders, they apparently must be brought in the District of Columbia where the Attorney General and the Commissioner of Immigration have their official residences. At any rate, the Courts of Appeals for the Second and Third Circuits have

[23] Figures for 1948 are used because they were more typical than the 1949 habeas corpus data, which were distorted by the inclusion of a large number of cases relating to alien enemies.

so held. *Connor* v. *Miller*, 178 F. 2d 755 (C. A. 2); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3). In contrast, the writ of habeas corpus can issue only in the district in which the alien is detained for deportation. *Ahrens* v. *Clark*, 335 U. S. 188.

It is important to note that suits for declaratory judgment are not required to be expedited as are habeas corpus proceedings.[24] Moreover, such suits will be brought in the District of Columbia where civil actions already encounter a calendar delay of more than 15 months after issue is joined. *Annual Report of the Director of the Administrative Office of the United States Courts* (1949) p. 112. It is apparent, therefore, that because of these venue and calendar consideration a suit for a declaratory judgment would offer far greater possibilities for delaying tactics than does a habeas corpus proceeding. Moreover, since declaratory judgment actions fall into the stream of general litigation, they would encounter other delays incident to formal pleadings, joiner of issue, motions, calendars, formal trials, etc. We can only conclude that if the decision below is upheld there will be filed in the District of Columbia a large number of suits for declara-

[24] It is true that Rule 57 of the Federal Rules of Civil Procedure permits the advancement of declaratory judgment suits. But this dispensation, we are informed, is seldom invoked and seldom granted. Courts are reluctant, in the absence of a showing of extraordinary need, to accord one case priority over others.

tory judgment, perhaps exceeding the present total volume of habeas corpus proceedings in deportation cases, for the purpose of delaying deportation. This purpose would be achieved by merely filing a complaint. It should be noted that the possibilities of delay thus created would logically be equally available to aliens held for exclusion from the United States, a process which has heretofore been subject to challenge only in habeas corpus proceedings.

Another practical reason for limiting the challenge of deportation orders to habeas corpus proceedings is that many deportation orders are not executed, e. g., because of the existence of war or because no other country will receive the aliens involved. As of April 15, 1949, there were 3,278 warrants of deportation which were not enforceable. Also, of these 3,278 deportation orders, 1,293 were based upon immoral or criminal charges and 112 were issued under the Act of October 16, 1918, as amended, which relates to subversive classes. *The Immigration and Naturalization Systems of the United States,* p. 639. While figures are not available, we believe that deportation orders based upon such serious grounds would account for a considerable portion of both the cases in which habeas corpus proceedings are brought and the cases in which the alien is never actually taken into custody for deportation because deportation is impossible. If judicial review is made available in a suit for

a declaratory judgment as soon as the deportation order is issued, such review will probably be had in a considerable number of cases in which deportation would not actually take place in any event.[25] Thus, judicial intervention is premature until the alien is taken into custody. This situation is comparable to that of a person finally classified by a selective service board who attempts to obtain judicial review of that classification before effort is made fully to execute the order.[26] Cf. *Falbo* v. *United States*, 320 U. S. 549, 553; *Estep* v. *United States*, *supra*.

Finally, it should be noted that the remedy of declaratory judgment made available by the decision below is in addition to, not in place of, the remedy of habeas corpus. There is nothing to prevent the respondent or any other alien who fails in his challenge to a deportation order in a suit for a declaratory judgment, from bringing a habeas corpus proceeding to test the validity of his detention under the same deportation order. We cannot believe that by enacting either the Declaratory Judgment Act or the Administrative

[25] These considerations are graphically illustrated in plaintiff's own situation. Although an order of deportation was entered against him May 5, 1941, the immigration authorities have not yet actually attempted to execute that order.

[26] Of course, selective service functions are expressly excluded from the orbit of the Administrative Procedure Act. Sec. 2 (a), Administrative Procedure Act, 5 U. S. C., Supp. II, 1001 (a); Sec. 13 (b), Selective Service Act of 1948, 50 U. S. C. App. (Supp. III) 463 (b). However, no such express exception is found in the Declaratory Judgment Act.

Procedure Act the Congress contemplated that it was providing repeated judicial review for administrative orders which it had declared to be "final."

III

THE COURT BELOW ERRED IN HOLDING THAT THE RESPONDENT'S CLAIMED EXEMPTION FROM MILITARY SERVICE AS A NEUTRAL ALIEN DID NOT MAKE HIM INELIGIBLE FOR SUSPENSION OF DEPORTATION

Assuming that we are in error as to the jurisdictional matters discussed above, we believe that the court below erred in its conclusion that the respondent was not ineligible for naturalization pursuant to Section 3 (a) of the Selective Training and Service Act of 1940, and was therefore eligible for suspension of deportation pursuant to Section 19 (c) of the Immigration Act. The latter provision authorizes suspension of the deportation of an otherwise deportable alien only if such alien is eligible for naturalization. It is admitted that the respondent is a deportable alien.

Section 3 (a) of the Selective Training and Service Act of 1940, as amended, provided at the time here involved that "every male citizen of the United States, and every other male person residing in the United States * * * shall be liable for training and service in the land or naval forces of the United States." Recognizing the general practice of nations not to conscript neutral

aliens,[27] Section 3 (a) provided an exemption from military service for any neutral alien applying for such exemption, and further provided that any such alien "shall thereafter be debarred from becoming a citizen of the United States." It is admitted that the respondent made appropriate application on Form DSS 301 for exemption as a neutral alien and that thereafter he enjoyed complete exemption from military service.

Nevertheless, the court below held that the respondent was not "residing in the United States" within the meaning of Section 3 (a) when he claimed such exemption, was therefore never liable for military service, and that thus his claim of exemption does not bar him from naturalization (R. 20, 24). Its conclusion that the respondent was not "residing in the United States" is based upon the following circumstances (see statement of facts, *supra*, pp. 6, 10): the respondent, a Danish citizen, legally entered the United States as a temporary visitor in August 1939. In May 1940, deportation proceedings were commenced against him, and in May 1941 he was ordered deported to Denmark, but deportation was deferred until the cessation of hostilities. On or about March 1942, he applied for exemption from military service as a neutral alien. Declaring that residence connotes choice,

[27] III Hackworth, *Digest of International Law*, p. 58. A similar provision was added in 1918 to the Selective Draft Act of 1917, 40 Stat. 76.

the consent of the sovereign, and a degree of permanence in the abode, the court below concluded that the respondent had not been "residing in the United States" in that he was a temporary visitor, under order of deportation, and unable to leave this country by reason of the war.

The court below found it unnecessary to reach respondent's contention that he executed Form DSS 301 as the result of misunderstanding as to its consequences,[28] and that contention will become relevant only if his assertion of non-resident status is unsuccessful. In that event, the Gov-

[28] The court also found it unnecessary to consider respondent's belated suggestion that he was not bound by the consequences of his Form DSS 301 because Denmark actually was not a neutral (R. 19–20, note 6). We doubt that respondent is in a position to make such a contention at this time, since the application for exemption was granted upon his own representation that he was a neutral alien and since he never at any time contended before the Selective Service authorities or the immigration authorities that he was not a neutral alien. On its merits, the claim seems entirely insubstantial. The determination of neutrality, like the determination of belligerency, is a political question which must be resolved by the President or the agency designated by him. *The Nueva Anna*, 6 Wheat. 193; *Ludecke* v. *Watkins*, 335 U. S. 160; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; 1 Hyde, *International Law* (Second Rev. Ed.) 198. In administering the Selective Service Act, the President empowered the Director of Selective Service to make such political decisions on his behalf. Local Board Memorandum No. 112, issued March 16, 1942, classified Denmark as a neutral nation and no change was made in that classification throughout the war. That classification enabled respondent to obtain relief from military service upon his own application. We submit that such a political determination is not open to judicial inquiry, particularly at this time.

ernment asks that the case be remanded for determination of the specific factual issue, upon which it is prepared to submit documentary evidence, presented by respondent's claim that he did not understand the effect of his plea for exemption. Accordingly, we will limit our argument here to the issue of residence upon which the court below based its decision, and to the effect of his claim of exemption from military service.

In pressing for favorable consideration of his application for suspension of deportation, respondent's claims present a number of irreconcilable contradictions. On the one hand, he states that he was never a resident of the United States and thus not liable to conscription. On the other hand, he asserts that he always desired to be a citizen of the United States and, presumably, to continue his residence in this country, and that he would never have knowingly surrendered the privilege to become a citizen of the United States. Facing in still another direction, respondent pleads for permission, through suspension of deportation, to continue residing in the United States, urging that in the many years of his "non-residence" in the United States he has established close family ties and a financial stake in this country.

In all the years of his dealings with the selective service and immigration authorities, ~~petitioner~~ respondent never claimed at any time that he was not residing in the United States. He made no such

claim when he complied with the original call for Selective Service registration on October 16, 1940, and registered at that time without any protest. He likewise did not suggest any such objection when he filed his DSS 301 in 1942 and actually obtained exemption from military service. Nor has he alleged in his complaint here that he was not then, or is not now, a resident of the United States. He never solicited a ruling from the Selective Service authorities that he was a non-resident alien and not subject to military service.[29] If he had made such an application and had been denied exemption, the findings of the local board would have been subject to judicial review only if they were without basis in fact. *Cox* v. *United States,* 332 U. S. 442; *Estep* v. *United States,* 327 U. S. 114. It is evident that respondent did not take advantage of the administrative remedies available to him and we do not believe he can complain now. See. *Falbo* v. *United States,* 320 U. S. 549.

[29] The complaint alleges (R. 4) that on November 19, 1946, more than a year after hostilities ended, respondent applied to his local board to withdraw his Form DSS 301, stating that it was filed as the result of misapprehension. That effort was prompted apparently by his pending application for suspension of deportation, during the course of which he learned that his Form DSS 301 might preclude his desire to remain in the United States. Respondent made no representation in his application to the local board in 1946 that he was a non-resident of the United States at the time of filing his DSS 301, nor did he make such a claim at any time before his case was presented to the court.

Throughout the war years, respondent enjoyed the exemption from military service which had been granted upon his application. Under the terms of the statute, an alien who applied for and obtained such exemption was thereafter barred from American citizenship. The statute did not prescribe for disqualification only in the case of a resident alien who filed such an application for relief from military service but declared that "any person who makes such application" shall be barred from United States citizenship. By filing the application and accepting relief from military service, respondent incurred the unconditional disqualification of the statute. Having availed himself of the benefits produced by his own application, it seems to us that elementary principles of equity require that respondent be defeated in his present belated attempt, long after hostilities have ended, to escape the disabilities which were equally inherent in his course of conduct. See *Savorgnan* v. *United States,* 338 U. S. 491.

The coverage of the registration and service requirements of the Selective Training and Service Act of 1940 should be interpreted in the light of its single objective of making available for military service the maximum number of men. In the absence of clear Congressional intent to the contrary, the niceties of residence and domicile should not be permitted to obstruct that fundamental objective. In naturalization usage

residence customarily presupposes lawful admission for permanent residence. *Zartarian* v. *Billings,* 204 U. S. 170; *Chow Gin* v. *United States,* 175 F. 2d 299 (C. A. 7); *Knauff* v. *McGrath,* 181 F. 2d 838 (C. A. 2). On the other hand, the immigration laws take into account, for some purposes, both legal and illegal residence. Thus a person whose residence is irregular, like respondent's here, may legalize his status through an application for suspension of deportation, or for relief under the so-called Seventh Proviso to Sec. 3 of the Immigration Act of 1917, 8 U. S. C. 136 p. Indeed, a recent amendment to the statute authorized suspension of deportation in the cases of aliens who have maintained an irregular "residence" in the United States for 7 years. Act of July 1, 1948, 62 Stat. 1206. Usages in other statutes depend entirely on the legislative purpose.

It is not denied that the Congress could have subjected those persons in the respondent's position to liability for military service under Section 3 (a). *Leonhard* v. *Eley,* 151 F. 2d 409 (C. A. 10). The only question is whether it did so. As originally enacted on September 16, 1940, 54 Stat. 885, Section 2 required registration under the Act of "every male citizen of the United States, and of every male alien residing in the United States". Section 3 (a), as originally enacted, imposed liability for training and service

upon male citizens and upon "every male alien residing in the United States who has declared his intention to become such a citizen" (i. e., declarant aliens). It is clear that under the original Section 3 (a) the respondent was not liable for military service. It is equally clear that he was obliged to register, as he did. When the orginal Act was under consideration in 1940, Senator Sheppard, Chairman of the Senate Military Affairs Committee, explained that it was deemed desirable to require the registration of all aliens, including those not required to serve, in order that their skills and capacities might be catalogued for possible future use. 86 Cong. Rec. 1093. When the bill was considered on the floor of the House, several Members called attention to the many recent refugees enjoying the protection of the United States and urged that they be required to serve as well as to register. But an amendment seeking to accomplish this aim was defeated. 86 Cong. Rec. 11371, 11390, 11664–11667.

However, on December 20, 1941, shortly after the Pearl Harbor attack, Congress amended Sections 2, 3 (a) and 5 (a) to change completely the handling of neutral aliens (55 Stat. 844). Sections 2 and 3 (a) were amended to apply the obligations of registration and service to citizens and "every other male person residing in the United States", thus dropping the earlier restriction of

the service obligation to declarant aliens.[30] Broadening the service obligations to include non-declarant as well as declarant aliens was bound to create questions of coverage because of the inevitable existence of classes of non-declarant aliens who could not be subjected to our military service. By this amendment, Congress made it clear that it intended to make the Act potentially applicable to every male alien. At the same time, it indicated that it was aware that some classes of non-declarant aliens must be excepted. It provided for the latter problem by amending Section 5 (a) to authorize the President to prescribe exempt categories of "persons * * * residing in the United States, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States", i. e., non-declarant aliens. There is no doubt as to the intended relationship between the amendments to Sections 3 (a) and 5 (a). In reporting the 1941 amendments, the House Military Affairs Committee stated, H. Rep. 1508, 77th Cong., 1st Sess., p. 4, that the amendment (No. 2) removing the limitations on requiring the service of non-declarant aliens was intended to reach

[30] The substitution of "persons" for the term "aliens" was intended to make certain that the statute would encompass both aliens and noncitizen nationals, as well as American citizens. 87 Cong. Rec. 9934, 10055, H. Rep. 1554, 77th Cong., 1st Sess. In the same amendment, the military authorities also were given authority to rejecte any enemy aliens whom they regarded as unsuitable for service.

"every male alien between such ages who has not declared his intention to become a citizen of the United States." The Committee added:

> The amendment made by section 2 of the committee amendment should be considered in connection with the amendment made by section 4, under which the President is given power to relieve such aliens who have not declared their intention to become citizens of the United States as he deems advisable from the registration requirements and from liability for service.

Without more, it would seem to be clear that when the Congress extended the service obligations of Section 3 (a) to non-declarant aliens it left the inevitable problem of inclusion and exclusion of particular classes of aliens to the President's determination under the power which the Congress simultaneously gave to him, rather than to interminable litigation over residence and domicile. And it could do this only by covering all aliens in the United States and leaving it to the President to create the necessary exceptions.[31] That this is what the Congress intended and did finds confirmation not only in the legislative history referred to above but also in the administrative construction of the Act.

[31] A contemporaneous legislative expression, requiring the registration and fingerprinting of all aliens in the United States for 30 days or longer, regardless of the apparent permanence of their immigration status, is found in Sec. 31 of the Alien Registration Act of June 28, 1940, 8 U. S. C. 452.

Shortly after enactment of the original 1940 Act, Attorney General Jackson was asked to determine whether the term "male alien residing in the United States" as used in Section 2 embraced various enumerated categories of aliens temporarily in the United States. Among the categories enumerated in the inquiry were "aliens on an immigration status which limits their sojourn in the United States to a specified future date, or to the happening of a specific contingency, and during which period such persons are under the supervision of the immigration authorities."[32] In a published opinion, the Attorney General concluded that the statute encompassed persons admitted under the immigration laws as temporary visitors and that "every alien * * * who lives or has a place of residence or abode in the United States, temporary or otherwise", was subject to the command of the statute. 39 Op. Atty. Gen. 504.

[32] The inquiry and the opinion covered the following classes of aliens:

"Temporary alien visitors for business or pleasure; transient aliens; bona fide alien seamen entering the United States temporarily in pursuit of their calling as seamen; treaty aliens; alien university students; and aliens on an immigration status which limits their sojourn in the United States to a specified future date, or to the happening of a specific contingency, and during which period such persons are under the supervision of the immigration authorities; also aliens who have been admitted into the United States as officials of a foreign government; and aliens who are in the United States and who have diplomatic status and immunity under the definitions of the State Department."

Following this opinion of the Attorney General, the Selective Service authorities always have adhered to the interpretation that the statute's command reached any alien who lived or had a place of residence or abode in the United States, regardless of the insecurity of his immigration status. That reading of the statute was incorporated in the Selective Service Regulations issued soon after the 1941 Amendments, which had made the statute broadly inclusive in regard to service as well as registration. 32 CFR 611.12, issued Feb. 7, 1942, provided that every male alien in the United States is to be regarded as a "male person residing in the United States" unless he fell within one of the categories mentioned in Sec. 611.13. Sec. 611.13 exempted various officers and employees of foreign governments and aliens who remained in the United States for less than 90 days. Subsection (b) of that section directed that any member of the latter group and any alien then in the United States might achieve nonresident status if he filed an application for determination of nonresidence (Form DSS 302) and obtained such a determination. Sec. 611.21, promulgated March 16, 1942 (about two weeks before the respondent filed his application for exemption on Form DSS 301),[33] authorized the filing of a Form DSS 302 within 90 days after

[33] The selective service records indicate that he filed his claim for exemption from military service on or about March 30, 1942.

entry or, in the case of those already in the United States, prior to May 16, 1942, in order to obtain a determination of nonresidence. Sec. 611.22 provided for determination of residence status by the local board and for a determination also as to the length of time applicant might remain in the United States without being regarded as a "male person residing in the United States." Sec. 611.23 provided for appeal to the Director of Selective Service. Sec. 611.21–1, which became effective June 27, 1945, allowed filing of the application for nonresident status at any time.

Thus, it appears that the court below misread the regulations in asserting (R. 24, fn. 13) that they did not give respondent, who had entered the United States more than three months previously, a right to claim nonresident status. Actually the regulations permitted him to file a claim to such status prior to May 16, 1942, two months after the regulation was promulgated, and for almost 1½ months after he filed his DSS 301. After June 27, 1945, he was permitted to file application for a determination of such nonresident status at any time. He never filed such an application and under the express requirement of the regulations he must be deemed a "male person residing in the United States."

The regulations issued by the President under the authority of Sections 5 (a) and 10 of the Selective Training and Service Act have the force

of law. The administrative reading of the statute thus has consistently regarded a person in respondent's position as within the reach of the Selective Training and Service Act. It is well established that such a consistent, unquestioned administrative construction is a true guide to interpretation, and should not be disturbed unless clearly fallacious. *United States* v. *Hill,* 120 U. S. 169; *Costanzo* v. *Tillinghast,* 287 U. S. 341; *Billings* v. *Truesdell,* 321 U. S. 542. And even more decisive is such a construction when Congress frequently has amended the statute without questioning the interpretation or revising the pertinent language.[34] *Helvering* v. *Winmill,* 305 U. S. 79; *Brewster* v. *Gage,* 280 U. S. 327. Indeed, in the current Selective Service Act of 1948, Secs. 3 and 4, 50 U. S. C. App. (Supp. III) 453 and 454, Congress has reenacted the identical language prescribing liability for registration and service of "every other male person residing in the United States."

The administrative construction of the statute has enlisted strong support in the decision of the Court of Appeals for the Second Circuit in *Benzian* v. *Godwin,* 168 F. 2d 952, certiorari de-

[34] In addition to the 1941 Amendment, the Selective Training and Service Act of 1940 was amended June 23, 1942, 56 Stat. 386; July 28, 1942, 56 Stat. 724; Nov. 13, 1942, 56 Stat. 1018; Dec. 5, 1943, 57 Stat. 596; July 12, 1943, 57 Stat. 518; June 25, 1943, 57 Stat. 164; June 28, 1944, 58 Stat. 544; Dec. 8, 1944, 58 Stat. 798.

nied, 335 U. S. 886, which considered contentions quite similar to those advanced by the respondent here. The plaintiff in that case was in a stronger position since he had taken advantage of the appropriate administrative remedies and had applied to the Selective Service authorities for a determination that he was not a "male person residing in the United States." Nevertheless, the Court of Appeals for the Second Circuit rejected the plaintiff's contention that the Selective Service Act did not apply to him because he had been admitted as a temporary visitor. The court declared (168 F. 2d at 956):

> It appears from the use of the phrase "every other male person residing in the United States," in both §§ 2 and 3 (a) of the amended Act, that Congress intended that everyone who was subject to registration should also be liable for service, unless he came within the categories specifically exempted by the Act. Congressional reenactment of substantially the same phrase concerning residence in § 2, after it had been interpreted by the Attorney General, indicates Congressional approval of that interpretation. It would follow, then, that since appellant was subject to registration under the Attorney General's interpretation, Congress intended him to be subject to registration under the amended Act. And if he was subject to registration he was also liable for serv-

> ice, unless (1) he applied for exemption as a neutral under § 3 (a) or (2) came within the category of an alien non-resident as determined by the Director of Selective Service by Regulation 611.13, promulgated under the authority of § 5 (a) of the Act.

Additional confirmation is found in *United States* v. *Haug*, 150 F. 2d 911 (C. A. 2). There the court held that a Norwegian seaman, whose temporary stay in the United States extended beyond three months, was subject to the requirements of the Selective Training and Service Act. The Court pointed out that he could have filed an application for exemption as a non-resident, and that his failure to do so foreclosed him from urging that the Selective Service requirements were not applicable to him.[35]

The sole remaining question is whether respondent was excused from liability for military service because an order of deportation was entered against him on May 15, 1941. The court below laid great stress upon this circumstance, declaring

[35] The case of *Ex parte Ghosh*, 58 F. Supp. 851 (S. D. Cal.) is not inconsistent with these holdings. In that case an alien student who had been classified on three occasions as a non-resident, was subsequently reclassified and declared to be a resident of the United States. The Court held that the latter action was unwarranted and arbitrary and stated (p. 857) that:

"The local board acted * * * without any supporting evidence and, I might say, in an arbitrary and capricious manner."

that it had deprived him of the "volition necessary to residence," that the "sovereign had withdrawn its consent" by issuing the deportation order, and that what remained was only the "purely ministerial act of deportation." (R. 25).

The obligations of the Selective Service Act do not rest upon any theoretical "consent of the sovereign" but on whether respondent actually was residing or had a place of abode in the United States. If his residence was dependent on personal volition, such volition certainly would not be affected by an order of deportation which was not being executed and indeed has not yet been executed. After 9 years of continued stay, it hardly can be said that the execution of the deportation order was merely ministerial. And if any consent of the sovereign were required, it would appear to have been granted by the direction that execution of the deportation order be deferred for the duration of the war. Thus respondent was permitted to remain in the United States and his situation was substantially the same as that of any temporary visitor who had overstayed his allotted period.

During the war years, there were many persons in the United States who had been admitted as temporary visitors. Many of them, like respondent, became technically subject to deportation because they were compelled to accept employment. However, the restrictions against employ-

ment were modified [36] and such refugees from the war were never in danger of being deported as long as the war lasted. Many of them established family ties in this country and were able to legalize their status in the United States through suspension of deportation or some other available process. Many others became members of the United States military forces and welcomed the opportunity to obtain the grant of American citizenship which thereupon became available to them. Secs. 7401 and 324 (a) of the Nationality Act of 1940, as amended, 8 U. S. C. 1001 and 724 (a).[37]

Respondent was not subject to an order of deportation at the time he registered as a resident alien. If he had desired to claim non-resident status, after the order of deportation was entered, he could have done so before May 16, 1942, or after June 27, 1945, and obtained a determination as to his residence status. This he did not do. If he had wished, as he now declares, to become a citizen of the United States, he could have achieved that ambition most expeditiously by submitting to induction into the armed forces of this country. Instead, he chose a third course,

[36] On September 11, 1942, these requirements were relaxed and temporary visitors were permitted to accept employment for the war's duration.

[37] The extension of such naturalization benefits to persons who entered as temporary visitors represents further evidence of a recognition by Congress that such persons were liable to service in the

which the law permitted, of claiming relief from military service as a neutral alien and surrendering the privilege of obtaining American citizenship.

The existence of the deferred and still unexecuted order of deportation seems to us to have no relevancy here, despite the court's tenuous assertions regarding the "consent of the sovereign". We believe that it is unrealistic to hold that an alien who had lived in the United States for almost three years at the time he sought exemption from military service, and who asserts now (after an aggregate stay of 11 years) that he wishes to remain indefinitely, was not to be deemed a resident for the purposes of the Selective Service Act although he has maintained a home in this country for all those years, has been employed constantly, and has established close family ties here. Moreover, it seems to us entirely unconscionable that such an alien should be permitted to elude the penalty he voluntarily undertook in exchange for exemption from military service.

In our view the legislative purpose is clear and unmistakable. Respondent did have a residence or place of abode in the United States during the crucial period and enjoyed the protection of the United States during the years of hostilities. He did seek and obtain exemption from military service as a neutral alien. He should endure the

consequences that the Congress attached to the exemption.

CONCLUSION

The judgment should be reversed upon the jurisdictional grounds (1) that it relates to administrative action which, because it is subject to the approval of Congress, cannot be made the subject of Federal judicial action, and (2) that the decision of the Attorney General in deportation proceedings may be challenged only in habeas corpus proceedings. Even if the courts below possessed jurisdiction in this case, the judgment should be reversed upon the substantive issue of the respondent's eligibility for suspension of deportation. In that event, we respectfully submit that the case should be remanded for consideration of the question, not decided by the court below, as to the truth and effect of the respondent's contention that he was misled as to the consequences of claiming exemption from military service as a neutral alien.

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